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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 535

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE & STORAGE COMPANY, AND NORTHEASTERN TRANSPORTATION COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTER STATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED AUGUST 21, 1941.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 20369

GREGG CARTAGE & STORAGE COMPANY, Cleveland, Ohio; HUGH WELLS, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, Leader Bldg., Cleveland, Ohio, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Washington, D. C., *Defendants*

BILL OF COMPLAINT—Filed June 7, 1940

1. These petitioners file their petition against the United States of America and the Interstate Commerce Commission to annul, set aside and enjoin an order hereinafter set forth of the Interstate Commerce Commission hereinafter called the "Commerce Commission", a commission existing under and by virtue of the Interstate Commerce Act.

2. Jurisdiction of this court is invoked under the provisions of Title 28 U. S. C. A., Section 41 (8), 41 (28), 43, 44, 45, 45a, 46, 47a and 48 of said act.

3. For their cause of action your petitioners complain in the following manner, to-wit: Your petitioner, the Gregg Cartage & Storage Company, says that it was formerly a corporation duly organized and existing under and by virtue of the laws of the State of Ohio with its principal place of business in the City of Cleveland, State of Ohio; your petitioner, Hugh Wells, says that on or about the 27th day of December, 1937, he was appointed trustee in bankruptcy of the Gregg Cartage & Storage Company by the District Court of the United States for the Northern District of Ohio, Eastern Division, and that he is now the duly appointed, qualified and acting trustee in bankruptcy of said company.

4. Your petitioner, the said Gregg Cartage & Storage [fol. 6] Company, says that it originally commenced operation in 1920 as a common carrier by motor vehicle and in 1925 incorporated as provided for by the laws of the State of Ohio under the name of the Gregg Cartage & Storage Company. In 1932 the company instituted interstate operations and in 1934 registered under the Code of Fair Competition with the National Recovery Administration. Terminals were maintained in Cleveland, Ohio; New York City and Buffalo, New York; Boston, Massachusetts; Detroit, Michigan; Cincinnati and Akron, Ohio; Chicago, Illinois; St. Louis, Missouri; Indianapolis, Indiana; Baltimore and Hagerstown, Maryland; and Pittsburgh, Pennsylvania; and such terminals were in operation on June 1, 1935 with the exception of the one in Buffalo. With respect to the terminal in Buffalo, this petitioner avers that said terminal was not operated continuously during the times mentioned herein. The petitioner, however, avers that operations were carried on continuously between Buffalo and other points since 1932. Said petitioner operated as a common carrier of general commodities over regular routes between Cleveland, Cincinnati, Toledo, Youngstown, Akron and Ravenna, Ohio; St. Louis, Missouri; Chicago, Illinois; Detroit, Michigan; Boston, Massachusetts; Baltimore, Maryland; New York City and Albany, New York; and Pittsburgh and Philadelphia, Pennsylvania, including intermediate and off-route points and other routes as appears fully in the January 6, 1936, report of William A. Maidens, examiner of the Interstate Commerce Commission, which report is attached hereto and incorporated as though fully rewritten herein and made a part hereof and marked "Exhibit A". This petitioner further alleges that it was at all times herein mentioned entitled as a matter of right and law under the provisions of Section 206a of the Motor Carriers Act of 1935 (Title 49 U. S. C. A., Section 306a) known as the "Grandfather's Clause" thereof, to have issued to it by the defendant Commerce Commission a certificate of public convenience and necessity authorizing such operation.

5. This petitioner by application filed on or about the 12th day of February, 1936, with the said Commerce Commission, sought a certificate of public convenience and necessity authorizing the petitioner to operate as a common carrier by motor vehicle over the routes and intermediate points

thereof as set forth in Exhibit A which is attached hereto and made a part hereof.

[fol. 7] 6. That thereafter the defendant Commerce Commission assigned said application for hearing before Examiner William A. Maidens and hearing was had before said William A. Maidens and evidence was presented, and thereafter on the 17th day of December, 1937, said William A. Maidens caused the following report and finding to be entered and transmitted a copy of the same to this petitioner, the material portion of said finding is as follows:

"Applicant found entitled to continue operation as a common carrier by motor vehicle, of general commodities, in interstate or foreign commerce, over irregular routes between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri and the District of Columbia by reason of having been engaged in such operation on June 1, 1935, and continuously since that time. Certificate granted."

Thereafter on the 8th day of April, 1938, the defendant Commerce Commission ordered that the application of this petitioner for a certificate of public convenience and necessity be referred to Examiner A. F. Borroughs for further hearing. Said order of reference did not designate for what purpose the said application was referred for additional hearing. Thereafter on the 4th day of May, 1938, hearing was had in accordance with said order and at said hearing the said Examiner A. F. Borroughs ruled as follows:

"The order of the Commission doesn't designate specifically what the issues are as you know, counsel. However, it is the Examiner's understanding and he now rules that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of a receivership of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding you may proceed."

In accordance with said ruling evidence was presented, a copy of which is attached hereto and incorporated as though fully rewritten herein and made a part hereof and marked

"Exhibit B"; and thereafter on the 29th day of June, 1938, the said A. F. Borroughs caused the following report, finding and recommendation to be entered and transmitted a copy of same to this petitioner, a copy of which report is attached hereto and incorporated as though fully rewritten herein and made a part hereof and marked "Exhibit "C". A material portion of said finding is as follows:

"Interruption of service found one over which applicant has had no control.

[fol. 8] "Applicant found entitled to resume operations as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over the routes and between the points set out in the prior report herein."

And thereafter and within the time specified by the order of Examiner A. F. Borroughs exceptions were filed to said report and thereafter on the 29th day of July, 1938, the defendant Commerce Commission submitted the order of A. F. Borroughs to Division 5 of said Commerce Commission and thereafter on the 14th day of November, 1938, the Commerce Commission through the report of Division 5, which report is attached hereto and incorporated as though fully rewritten herein and made a part hereof and marked "Exhibit D", denied the application of this petitioner; and thereafter and within the time specified by the rules and regulations of the Commerce Commission this petitioner filed its petition for reargument and reconsideration of its application before the entire Commerce Commission; and thereafter on the 13th day of April, 1939, the defendant Commerce Commission heard oral argument on said application and that on the 12th day of December, 1939, the defendant Commerce Commission in its report, which report is attached hereto and incorporated as though fully rewritten herein and made a part hereof and marked "Exhibit E" affirmed the report of Division 5 of said Commerce Commission and thereafter and within the proper time this petitioner filed its petition with the defendant Commerce Commission requesting a reargument and reconsideration before the entire Commerce Commission; and thereafter on the 8th day of April, 1940, said defendant Commerce Commission denied this petitioner's request for reargument and reconsideration.

7. Petitioner alleges that by its application filed with the defendant Commerce Commission and by the evidence ad-

duced at the hearing before Examiner William A. Maidens it was shown that the petitioner was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and prior thereto over the routes and within the territory for which application was made. Plaintiff further alleges that there was no evidence before said Commerce Commission to the contrary and the petitioner was entitled to a certificate of public convenience and necessity as provided for by Section 206a of the Motor Carrier Act of 1935 (Title 49 U. S. C. A. Section 306a). Petitioner further alleges that the evidence adduced at the hearing before A. F. Borroughs, [fol. 9] examiner, further showed that the petitioner was not at fault for any interruption of service and that the discontinuance of operation due to bankruptcy was not an interruption of service over which this petitioner had control within the meaning of Sections 206a and 209a of the Motor Carriers Act of 1935 (Title 49 U. S. C. A. 306a and 309a) and that there was no evidence before said Commerce Commission to the contrary and that the action of the defendant Commerce Commission is contrary to the evidence and in making and entering said order denying the application of this petitioner the Commerce Commission exceeded its statutory powers and acted arbitrarily and unreasonably and based said order upon improper distinctions and considerations and interpretations of the Motor Carrier Act of 1935. By reason of the premises petitioner has been denied due process of law contrary to the provisions of the Fifth Amendment of the Constitution of the United States and will suffer great and irreparable injury in that petitioner's business will be wholly lost and destroyed. Petitioner further alleges that the Commerce Commission acted arbitrarily and unreasonably and without evidence to support its report in finding that the unexpected obligations thrust upon this petition- due to the bankruptcy of two insurance companies was within this petitioner's control; and that there was evidence of poor business management and that the petitioner's insolvency resulted from its failure to properly conduct its business and that the Commerce Commission in finding that the continued non-operation by this petitioner was within its control has acted arbitrarily and unreasonably in that said non-operation of this petitioner was due to the failure of the Commerce Commission to approve the sale and transfer of whatever rights this petitioner had. Petitioner further alleges that

the defendant Commerce Commission acted arbitrarily and unreasonably in failing to take into consideration the character of the operation and circumstances under which the interruption of service occurred; that the Commerce Commission exceeded the statutory powers in creating improper distinctions and preferences between carriers who had seasonably filed their application for grandfather rights in that said Commerce Commission unjustly, arbitrarily and unreasonably deprived certain carriers including this petitioner of the rights and benefits accruing under section 212 of the Motor Carriers Act of 1935 (Title 49 U. S. C. A. [fols. 10-11] Section 312).

Wherefore, petitioners pray:

1. Writ of Subpoena ad Respondendum issue immediately out of, and under seal of this Court, and be directed to said defendants, United States of America and Interstate Commerce Commission, requiring and commanding said defendants on day certain therein to be specified to be and appear before this Court and to answer this Bill;

2. That this Court direct that due and proper notice of this Bill and proceedings issue, and be served forthwith, as prescribed in Act of October 22, 1913, C-32; 28 U. S. C. A., Section 41 (8), 41 (28), 43, 44, 45, 45a, 46, 47a and 48 of said act;

3. That this Court enter its order setting aside and annulling said order of said Interstate Commerce Commission, and each and every part thereof, and forever enjoin any construction thereunder;

4. That this Court upon final hearing issue an order upon the defendant, Interstate Commerce Commission commanding said Interstate Commerce Commission to issue a certificate of public convenience and necessity to this petitioner, The Gregg Cartage & Storage Company;

5. That petitioners have and recover of said defendant their proper costs of suit;

6. That petitioners have such other, further, and general relief as may be equitable and proper.

Respectfully submitted, Howell Leuck & Bingham W. Zellmer, Attorneys for Petitioners, 840 Leader Building, Cleveland, Ohio, CH 5344.

Duly sworn to by Howell Leuck, jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO BILL OF COMPLAINT

Interstate Commerce Commission

No. MC-51204

Gregg Cartage and Storage Company Contract Carrier Application

No. MC-51088

Gregg Cartage and Storage Company Common Carrier Application

No. MC-51089

Gregg Cartage and Storage Company Broker Application

Report and order recommended by William A. Maidens, Examiner

Served Dec. 17, 1937

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission.

[fol. 13] Interstate Commerce Commission

No. MC-51204 [1]

Gregg Cartage and Storage Company Contract Carrier Application

Submitted ——— —, ——— Decided ——— —, ———

1. Applicant found entitled to continue operation as a common carrier by motor vehicle, of general commodities, in

[1] This report also embraces No. MC-51088, Gregg Cartage and Storage Company Common Carrier Application, and No. MC-51089, Gregg Cartage and Storage Company Broker Application.

interstate or foreign commerce, over irregular routes between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and the District of Columbia by reason of having been engaged in such operation on June 1, 1935, and continuously since that time. Certificate granted.

2. Operation by applicant as broker for the purpose of arranging transportation of property by motor vehicle, in interstate or foreign commerce, not shown to be consistent with the public interest and the policy declared in Section 202(a) of the Motor Carrier Act, 1935. Application for license denied.

Dane O. Sprankle and *W. M. Durkin* for applicant.

Taylor C. Burneson, P. J. Coughlin, E. E. Kundtz, B. W. LaTourette, Joseph F. Hays, H. P. Stacy, D. P. Connell, T. J. Minich for protestants.

Report and Order

Recommended by William A. Maidens, Examiner

The three applications considered were filed by The Gregg Cartage and Storage Co., a corporation of Cleveland, Ohio, on February 12, 1936. In Nos. MC-51204 and MC-51088 applicant seeks a certificate of public convenience and necessity, or a permit, authorizing operation as a common or contract carrier by motor vehicle in the transportation of general commodities between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and District of Columbia over irregular routes by reason of bona fide operations on June 1, 1935, and continuously thereafter. By application in No. [fol. 14] MC-51089 (filed on form BMC B) applicant seeks a license authorizing operation as a broker for the purpose of arranging transportation of property by motor vehicle in interstate or foreign commerce.

Another application in No. MC-51090, was filed by Joseph Gregg doing business as the Gregg Carloading & Distributing Co., of Cleveland, also seeking a license to operate as a broker, for the purpose of arranging transportation of property by motor vehicle in the States of Missouri, Illinois,

Indiana, Michigan, Ohio, Pennsylvania, New York, New Jersey, and Massachusetts. That application will be the subject of a separate report.

In accordance with the provisions of the Motor Carrier Act, 1935, the three applications considered were referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing has been held. Numerous motor and rail carriers opposed the granting of the applications but offered no affirmative testimony.

Applicant refers to numerous articles which are restricted under its tariff rules such as bank bills, currency, negotiable instruments, jewelry, precious stones, and articles of extraordinary value which "unless otherwise provided" will not be accepted for shipment. Other articles, such as those "liable to impregnate or damage equipment", livestock, packing-house products, and household furniture, will be accepted under certain circumstances. Inasmuch as the articles referred to are not definitely exempted from transportation they will not be specified as exempted commodities in the order herein.

While applicant states that it operated over irregular routes on June 1, 1935, it specifies the routes and points used in connection with its irregular operation which are shown in Appendix 1 hereto. Applicant asks that the aforesaid [fol. 15] routes be construed as descriptions only and not as restrictions. The operation applied for is between any and all points on the aforesaid routes. Points not shown in Appendix 1 are served by connecting carriers. Applicant apparently uses the term regular and irregular to describe operations from a standpoint of time rather than routes. The off-route points alleged to have been served by applicant are shown in Appendix 2. Applicant also conducts a local cartage business in Cleveland "in a zone commercially a part of and adjacent to Cleveland" but such zone is not further described. The application in No. MC-51088 shows the number of vehicles in revenue service on June 1, 1935, to be 220 tractors and 220 semi-trailers, of which number applicant owned but four.

The corporation was formed in 1925, with its original purpose being transportation. Joseph Gregg is president and owns all but two shares of the stock. Prior to the incorporation Mr. Gregg was engaged in the business of local cartage and warehousing. In 1932 applicant instituted interstate transportation operations. Applicant was registered

under the Code of Fair Competition with the National Recovery Administration on February 14, 1934. Joseph Gregg also operates the Gregg Carloading & Distributing Co., not a corporation, hereinafter called the Carloading Company, and states that this company is just a trade name for the applicant. Separate accounting systems are maintained for each company, but the bank account is in the name of applicant.

Applicant maintains terminals in Cleveland, New York and Buffalo, N. Y., Boston, Mass., Detroit, Mich., Cincinnati and Akron, Ohio, Chicago, Ill., St. Louis, Mo., Indianapolis, Ind., Baltimore and Hagerstown, Md. The terminals referred to were operated on June 1, 1935, with the exception of the one in Buffalo. Applicant has, however, been operating between Buffalo and other points since 1932. In some instances the terminals are leased and in others they are not. The leases are held in the name of applicant.

[fol. 16] Applicant, at the time of hearing, June 8 and 9, 1937, had 39 trucks registered in Ohio, and operated about 200 over its entire system. It now owns 25 trucks, and 5 tractors and trailers, with which it picks up and delivers property in Cleveland. Applicant does not and did not, on June 1, 1935, own any "over-the-road equipment" but employed, on call, owner-drivers to transport for it. Since 1933 the drivers of the equipment employed by applicant have been reimbursed on a trip basis, and are at liberty to accept employment by others, although applicant carries the liability and property insurance for them. The Carloading Company assembles property and transports the same through the facilities of applicant under contract, for which operation the latter maintains separate rate schedules. However, applicant holds itself out to be a common carrier, serving the general public, and has established separate rates for such operation which are on file with this Commission. At the hearing applicant's attorney stated that it desired a certificate as a common carrier, rather than a permit.

Applicant, on cross examination, admitted that upon request a different basis of rates was quoted when property was offered for transportation through the Carloading Company than when offered to applicant. In other words, if a lower rate were available through the operation of one organization than the other, transportation would of course, be made on the lower rate.

Applicant obtained permission to operate as a common carrier over irregular routes within the State of Ohio in 1933 under certificate No. 3936, issued by the Public Utilities Commission of that State. An amended certificate was granted to applicant, under No. 3953 on May 20, 1935, authorizing operation in interstate commerce over certain [fol. 17] specified highways within Ohio, and on September 13, 1935, the same State, under this same number granted an amended certificate authorizing operations over additional specified routes within Ohio. Certificates were granted to applicant by the Public Service Commission of Indiana under no. 1985-M on March 13, 1934, under no. 2610-M on April 10, 1935, under no. 621-A (1) and (2) on July 17, 1935, and under no. 621-A-3 on October 25, 1935, to operate as a common carrier over certain specified routes in interstate commerce. The Michigan Public Utilities Commission under no. C-3855 of March 16, 1934, granted applicant authority to operate as a common carrier between Detroit and the Michigan-Ohio State line over U. S. Highways 24 and 25. To the best of applicant's knowledge and belief it was not required, on June 1, 1935, to obtain certificates for operation in the other States considered, except Missouri.

Applicant represents that all routes shown in Appendix 1 were operated prior and subsequent to June 1, 1935; that solicitations for the transportation of property from and to all intermediate points along those routes have been made; and that property has been transported from and to intermediate points on the said routes. Applicant states that it has maintained daily service between St. Louis, Chicago, Indianapolis, Detroit, Toledo, Akron, Cleveland, Baltimore, Pittsburgh, Philadelphia, Boston, New York and Buffalo prior to and continuously since June 1, 1935. The operation to intermediate and off-route points is represented to be about 5 days each week.

Numerous documents in the form of manifests and truck-dispatch reports were introduced as representative of the transportation operations of applicant. The original bill of lading and shipping order is returned to the shipper as a receipt for the goods to be transported. Applicant retains a copy of the shipping order and from that prepares a manifest and the freight bills. One group of shipping orders [fol. 18] bears the receipt stamp of the Carloading Company, while the merchandise is represented as having been trans-

ported by applicant. Another group of orders bears the stamp date of applicant only. The first group indicates that the miscellaneous property shown thereon originated at points beyond Cleveland, was there assembled and transported in one truck on April 12, 1935, to Chicago for local delivery and less-than-truckload movement to points beyond. The second group of orders which bears the receipt stamp of applicant only, evidences the transportation of miscellaneous property, on dates ranging from March 26 to April 9, 1935, between Cleveland, Hammond, Ind., Detroit, Pittsburgh, Boston, St. Louis, and Brooklyn, N. Y. The connecting line or transfer points shown on the first group of shipping orders are South Bend, Michigan City, and Hammond, Ind., Davenport, Iowa, Chicago, South Chicago, Evanston, Peoria, Springfield, Rockford, and Englewood, Ill., Kenosha and Milwaukee, Wis., and Denver, Colo.

Twenty-eight manifests depict the movement of various and sundry articles between the key concentration points of Cleveland, New York, Boston, Detroit, St. Louis, Chicago, Pittsburgh, and Pottsville, Pa., on dates ranging from April 1, 1935 to December 9, 1936. Those manifests also bear the receipt stamp of the Carloading Company, and the commodities shown thereon are represented as having been transported by applicant. The manifests further show that many of the shipments were collected in less-than-truckload quantities from points beyond the aforesaid key points, and then transported in truckloads to other key points for movement in less-than-truckload quantities beyond. For instance the shipments which moved April 8, 1935, originated at Ravenna and Akron, Ohio, were assembled at Cleveland, and transported in one truck to New York; and at the latter point broken down and transported by applicant's connections to Brooklyn, New Haven and Hartford, Conn., Jamaica, L. I., and Woonsocket, R. I., Worcester and Lowell, Mass. [fol. 19] Another manifest dated November 27, 1935, shows thereon, that shipments were collected at various points beyond Boston, in Maine and New Hampshire, and transported to Cleveland for distribution to Columbus and Cincinnati, Ohio, Pittsburgh, Leavenworth, Kans., Cedar Rapids, Iowa, St. Louis, Mo., Vanceburg, Ky., Chicago and Detroit. A third manifest shows certain shipments originating beyond Cleveland, there assembled, and transported in one truck to Pittsburgh for transportation in less-than-truckload quantities to Harrisburg, Pa., and Washington, D. C. The fore-

going depicts the situation generally, and to reproduce the entire information contained on each of the manifests would prove burdensome to the report.

Eighteen representative truck-dispatch reports, as required by the Public Utilities Commission of Ohio, were submitted for the purpose of showing continuity of movements. The dates thereon range from September 1 to September 30, 1936. Those reports show movements of certain trucks between Cleveland, New York, St. Louis, Baltimore, Philadelphia and Boston, and bear reference to Ohio and Indiana authorization nos. 3952 and 621-A, respectively. Like reports were submitted for the period May 1 to 5, 1937, embracing movements between Cleveland, Boston, Pittsburgh, Baltimore, Buffalo, Indianapolis, Cincinnati, Detroit, New York, and Philadelphia.

While the evidence herein relates only to movement by motor vehicle, applicant also transports property by rail road under a consolidated or pool car arrangement. Inbound shipments by railroad to Cleveland are delivered locally by applicant, and it also transports shipments by rail from that point. The names of applicant and the Carloading Company are used in connection with those activities.

Two witnesses, operating motor equipment for applicant, testified that they had been transporting for it since prior to June 1, 1935. One testified that he had been transporting general commodities for applicant for the past four years [fol. 20] between Cleveland, Pittsburgh, Jeannette, McKeesport, and McKees Rocks, Pa., and Youngstown, Canton, Alliance, and Salem, Ohio. The other instituted operations for applicant in 1934 between Cleveland and Detroit. Both drivers were paid on a trip basis and stated that applicant carried the public liability and cargo insurance.

At the hearing applicant's attention was directed to its route 6 between Chicago and Cleveland, which for a portion of the distance through the northern part of Indiana closely parallels its route over U. S. Highway 20. Applicant is authorized by the State of Indiana to use Highway 20 from the Illinois-Indiana State line to the Indiana-Ohio State line. Applicant's only explanation of this was that it customarily uses U. S. Highway 20, which it regards as its main route, but occasionally uses U. S. Highway 6 in order to serve certain intermediate points on that route.

Applicant's motor carrier operation falls within the definition of a common carrier as contained in the act. It has held itself out to be a common carrier, assumes all the liabilities of such, and the fact that it did not own the "over-the-road equipment" would not remove it from that category. It is the duty of a carrier to provide and furnish transportation, including equipment for the physical transportation. Such duty does not require carriers' ownership of such equipment, but places upon them the duty of providing equipment which may be their own or that which they have secured in some other manner. Insofar as its assembling operations in Cleveland are concerned, the record shown that it does use its own equipment.

While the maintenance of separate rates by applicant and the Carloading Company appears to be a practice which should be discontinued, such rates are not in issue here and are more appropriate for consideration in some other pro-
[fol. 21] ceeding. A finding in connection with the brokerage application filed by the Carloading Company and now pending hearing and further disposition will not be inconsistent with the finding here, as the Commission may issue a license covering part of an operation. *Acme Fast Freight, Inc., Common Carrier Application*, 2 M. C. C. 415.

The examiner finds that applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over irregular routes between the points described in Appendix 1 and 2 hereto; and that it is entitled to a certificate authorizing the continuance of such operations.

The examiner further finds that applicant is not a broker within the meaning of the Motor Carrier Act, 1935, and has failed to show that such services are or will be consistent with the public interest and the policy declared in Section 202 (a) of the act. The authority sought in no. MC-51089 should, therefore, be denied.

It is recommended that the appended order be entered.

(Signed) William A. Maidens, Examiner.

[fol. 22] APPENDIX 1

Description of Route

Route 1. St. Louis, Mo., to Cleveland, Ohio, as follows:

From St. Louis to Terre Haute, Ind., via U. S. 40; Terre Haute to Rockville, Ind., via U. S. 41; Rockville to Indian-

apolis, Ind., via. U. S. 36; Indianapolis to Noblesville, Ind., via Indiana route 13; Noblesville to state route 38 via route 32; State route 32 to Richmond, Ind., via state route 38; Richmond to Lafayette, Ohio, via U. S. 40; Lafayette to Cleveland, Ohio, via U. S. 42. Alternate route, Richmond to Cleveland: Richmond to Columbus, Ohio, via U. S. 40; Columbus to Delaware, Ohio, via U. S. 23; Delaware to Cleveland, Ohio, via U. S. 42.

Route 2. St. Louis, Mo., to Toledo, Ohio, as follows:

From St. Louis, Mo., to Terre Haute, Ind., via U. S. 40; Terre Haute to Rockville, Ind., via U. S. 41; Rockville to Indiana state route 43 via U. S. 36; U. S. 36 to Romney via state route 43; Romney to state route 29 via route 28; State route 28 to Burlington, Ind., via state route 29; Burlington to state route 9, via U. S. 35; U. S. route 35 to Anderson via state route 9; Anderson to Marion, Ind., via state route 9; Marion to Fiat, Ind., via state route 18; Fiat to the Ohio-Indiana state line via state route 67; The Ohio-Indiana state line to Wapakoneta, Ohio, via Ohio route 32; Wapakoneta to Findlay via U. S. 25; Findlay to Fostoria via state route 12; Fostoria to Toledo via U. S. 23.

Route 3. Cincinnati, Ohio, to Cleveland, Ohio, as follows:

From Cincinnati to Dayton, Ohio, via U. S. 25; Dayton to Springfield, Ohio, via state route 4; Springfield to Lafayette, Ohio, via U. S. 40; Lafayette to Cleveland, Ohio, via U. S. 42.

Route 4. Cincinnati, Ohio, to Toledo, Ohio, as follows:

From Cincinnati to Findlay, Ohio, via U. S. 25; Findlay to Fostoria via state route 12; Fostoria to Toledo, Ohio, via U. S. 23.

Route 5. Chicago, Illinois, to Cleveland, Ohio, as follows:

From Chicago to Ohio state route 263 via U. S. 20; U. S. 20 to Toledo, Ohio, via state route 263; Toledo to Lorain, Ohio, via state route 2; Lorain to state route 254 via state route 57; State route 57 to Cleveland, via state route 254. Alternate route, Lorain to Cleveland: Lorain to state route 10 via state route 57; State route 57 to Cleveland via state route 10.

[fol. 23] Route 6. Chicago, Illinois, to Cleveland, Ohio, as follows:

From Chicago to Gary, Ind., via U. S. 20; Gary to Westville, Ind., via U. S. 6; Westville, Ind., to La Porte, Ind., via

state route 2; La Porte to U. S. 6 via U. S. 35; U. S. 35 to Lorain, Ohio, via U. S. 6; Lorain to State route 10 via state route 57; State route 57 to Cleveland via state route 10.

Route 7. Chicago, Illinois, to Cleveland, Ohio, as follows:
From Chicago to Ohio state route 49 via U. S. 20; U. S. 20 to Edon, Ohio, via Ohio state route 49; Edon to Bryan, Ohio, via state route 34; Bryan to Lorain, Ohio, via U. S. 6; Lorain to state route 10 via state route 57; State route 57 to Cleveland via state route 10.

Route 8. Detroit, Michigan, to Cleveland, Ohio, as follows:
From Detroit to Toledo, Ohio, via U. S. 24, or Detroit to Toledo, Ohio via U. S. 25; Toledo to U. S. Route 20 via state route 102; State route 102 to Fremont, Ohio, via U. S. 20. Alternate route, Toledo to Fremont: Toledo to State route 163 via state route 102; State route 102 to Oak Harbor via state route 163; Oak Harbor to Fremont via state route 19; Fremont to Lorain via U. S. 6; Lorain to state route 10 via state route 57; State route 57 to Cleveland, Ohio, via state route 10.

Route 9. Toledo, Ohio, to Youngstown, Ohio, as follows:
From Toledo to Fostoria, Ohio, via U. S. route 23; Fostoria to Barbarton via U. S. 224; Barbarton to Akron, Ohio, via state route 5; Akron to Youngstown via state route 18.

Route 10. Akron to Ravenna, Ohio, as follows:
From Akron, Ohio to Ravenna, Ohio, via state route 5.

Route 11. Cleveland, Ohio, to Boston, Massachusetts, as follows:
From Cleveland to state route 288 via state route 283; State route 283 to U. S. 20 via state route 288; State route 288 to Willoughby-Kirtland Rd. via U. S. 20; U. S. 20 to state route 84 via Willoughby-Kirtland Rd.; Willoughby-Kirtland Rd. to Geneva, Ohio, via state route 84; Geneva to Ashtabula via county road; Ashtabula, Ohio, to Irving, N. Y. via U. S. 20; Irving to Buffalo, N. Y., via state route 5; Buffalo to Batavia, N. Y., via state route 33; Batavia to Syracuse, N. Y., via state route 5. Alternate Route, Batavia to Syracuse: Batavia to Rochester, N. Y. via state route 33; Rochester to Pittsford, N. Y., via state route 15; Pitts-
[fol. 24] ford to Weedsport, N. Y., via state route 31; Weedsport to state route 5 via state route 318; State route 318 to

Syracuse, N. Y., via state route 5; Syracuse to Albany, N. Y., via state route 5; Albany to Massachusetts state route 9 via U. S. 20; U. S. 20 to Boston, Mass., via state route 9.

Route 12. Cleveland, Ohio, to Baltimore, Maryland, as follows:

From Cleveland to Ohio-Pennsylvania state line via state route 14; Ohio-Pennsylvania state line to Pittsburgh, Pa., via state route 51; Pittsburgh to Gettysburg, Pa., via U. S. 30; Gettysburg to Baltimore, Md., via U. S. 140.

Route 13. Baltimore, Md., to Boston, Mass., as follows:

From Baltimore, Md., to Wilmington, Del., via U. S. 40; Wilmington, Del., to Philadelphia, Pa., via U. S. 13; Philadelphia, Pa., to Wakefield, R. I., via U. S. 1; Wakefield to Wickford, R. I., via U. S. 1B; Wickford, R. I., to Boston, Mass., via U. S. 1.

Route 14. Albany, N. Y., to New York, N. Y., as follows:

From Albany to New York via New York state route 9.

Route 15. Cleveland, Ohio, to Philadelphia, Pa., as follows:

From Cleveland to Ebensburg, Pa., via U. S. 422; Ebensburg to Harrisburg, Pa., via U. S. 22; Harrisburg to Lancaster, Pa., via U. S. 230; Lancaster to Philadelphia via U. S. 30.

Route 16. Cleveland, Ohio, to Pittsburgh, Pa., as follows:

From Cleveland to New Castle, Pa., via U. S. 422; New Castle to Rochester, Pa., via state route 18; Rochester to Pittsburgh via state route 51.

Route 17. Pittsburgh, Pa., to New York, N. Y., as follows:

From Pittsburgh to New Kensington, Pa., via state route 28; New Kensington to Shady Plains, Pa., via state route 56; Shady Plains to Shelocta, Pa., via state route 156; Shelocta to Ebensburg, Pa., via U. S. 422; Ebensburg, Pa., to New York, N. Y., via U. S. 22.

[fol. 25] APPENDIX 2

Off Route Points Served

Chicago, Illinois, to New York and Boston:

La Porte, Ind.
Chicago Heights, Ill.
Joliet, Ill.
Elyria, Ohio
Norwalk, Ohio
Fremont, Ohio
Fairport Harbor, Ohio
Buffalo, New York
Niagara Falls, New York
Lockport, New York
Rochester, N. Y.
Syracuse, N. Y.
Troy, New York
Aurora, New York
Rome, New York
Utica, New York
Schenectady, N. Y.
Kingston, N. Y.
Amsterdam, N. Y.
Newburg, N. Y.
Newark, N. J.
Elizabeth, N. J.
New Brunswick, N. J.
Passaic, N. J.
Dunellen, N. J.
Chicopee, Mass.
Holyoke, Mass.
Gardner, Mass.
Framingham, Mass.
Quincy, Mass.
Lynn, Mass.

Cleveland to Philadelphia, Baltimore and Washington, D. C.:

Allentown, Pa.
Altoona, Pa.
Johnstown, Pa.
Pottsville, Pa.
Lancaster, Pa.
Bethlehem, Pa.
Chester, Pa.
Coatesville, Pa.
Norristown, Pa.
Lansdale, Pa.

Cleveland to Pittsburgh, Pa.:

New Kensington, Pa.
Brackenridge, Pa.
Verona, Pa.
Jeannette, Pa.
McKeesport, Pa.

Cleveland to St. Louis, Mo.:

Muncie, Ind.
Anderson, Ind.
Bellville, Ill.
Alton, Ill.
East Alton, Ill.
Granite City, Ill.

[fol. 26] Recommended by

(Signature) William A. Maidens, Examiner.

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C. on the — day of — A. D. 1937.

No. MC-51204

GREGG CARTAGE AND STORAGE COMPANY CONTRACT CARRIER APPLICATION

No. MC-51088

GREGG CARGAGE AND STORAGE COMPANY COMMON CARRIER APPLICATION

No. MC-51089

GREGG CARTAGE AND STORAGE COMPANY BROKER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said applications upon due notice having been heard by Examiner William A. Maidens, which examiner has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That upon full compliance with all requirements of Sections 215 and 217 of the Motor Carrier Act, 1935, and with the rules and regulations promulgated by this Commission thereunder, a certificate of public convenience and necessity be issued to The Gregg Cartage and Storage Co., of Cleveland, Ohio, authorizing it to operate as a common carrier of general commodities, over irregular routes between Cleveland, Cincinnati, Toledo, Youngstown, Akron and Ravenna, Ohio, St. Louis, Mo., Chicago, Ill., Detroit, Mich., Boston, Mass., Baltimore, Md., New York and Albany, N. Y., and Philadelphia and Pittsburgh, Pa., including intermediate and off-route points as specified in Appendices 1 and 2 of the report herein above referred to;

It is further ordered, That the above-described certificate shall be issued upon the condition that the operations authorized therein shall be conducted in accordance with the rules, regulations, and requirements relating thereto issued by the Commission under the Motor Carrier Act, 1935.

[fol. 27] *It is further ordered*, That in all other respects the said applications be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on ——— —, ———.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal).

[fol. 28] EXHIBIT "B" TO BILL OF COMPLAINT

[fol. 29] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 51204

(Form BMC A)

In the Matter of the Application of THE GREGG CARTAGE & STORAGE COMPANY, a Corporation, of 1241 East 26th Street, Cleveland, Ohio, for a Certificate of Public Convenience and Necessity or Permit (Form BMC A) Authorizing Operation as a Common or Contract Carrier by Motor Vehicle in the Transportation of Commodities Generally, in Interstate Commerce, in the States of Missouri, Illinois, Indiana, Ohio, West Virginia, Pennsylvania, New York, Connecticut, Rhode Island, and Massachusetts, between St. Louis, Mo., and Boston, Mass., via Chicago, Ill., Indianapolis, Ind., Detroit, Mich., Cleveland and Cincinnati, Ohio, Pittsburgh and Philadelphia, Pa., Buffalo, Albany, and New York, N. Y., Hartford, Conn., and Providence, R. I.

Docket No. MC 51088

(Form BMC 1)

In the Matter of the Application of THE GREGG CARTAGE & STORAGE COMPANY, a Corporation, of 1241 East 26th Street, Cleveland, Ohio, for a Certificate of Public Convenience and Necessity or Permit (Form BMC 1) Authorizing Operation as a Common or Contract Carrier by Motor Vehicle in the Transportation of Commodities Generally, in Interstate Commerce, from and between Points Located in the States of Ohio, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and District of Columbia, over Irregular Routes

Cleveland, Ohio, May 4, 1938, 10:00 a. m.

Before A. F. Borroughs, Examiner, Interstate Commerce Commission

Met pursuant to notice.

[fols. 30-31] APPEARANCES

Howell Leuck, 840 Leader Building, Cleveland, Ohio, appearing for the applicant.

Henry P. Stacy and T. J. Minich, 314 Michigan Central Station, Detroit, Michigan, appearing for Central Freight Association lines and New York Central Railroad, protestants.

Harold G. Hernly, Transportation Building, Washington, D. C., appearing for Rail Carriers, Central Freight Association Territory, protestants.

Howard H. Adomeit, 488 East 109th Street, appearing for Transamerican Freight Lines, Inc., protestants.

W. Furman, 1714 Woodland Avenue, Cleveland, Ohio, appearing for Motor Carriers Tariff Bureau, protestants.

J. J. Kuhner, 1714 Woodland Avenue, Cleveland, Ohio, appearing for Motor Carriers Tariff Bureau, protestants.

[fol. 32] COLLOQUY

Exam. Borroughs: The hearing will come to order, please. The Interstate Commerce Commission has set for further hearing before the examiner at this time and place Docket Numbers MC 51204 and MC 51088, which are the applications of the Gregg Cartage and Storage Company for a permit and a certificate of public convenience and necessity authorizing operations as a contract and common carrier by motor vehicle in the transportation of general commodities between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, and District of Columbia, over irregular routes, more detailed statement of routes or territories is contained in the said applications, copies of which are on file and may be inspected at the office of the Interstate Commerce Commission, Washington, D. C., or at the offices of the Board, Commissions, or officials of the states involved in these applications.

Hearings on these applications were originally held on June 8th and June 9th, 1937, and a recommended report and order thereof was served on December 17, 1937.

I will now call for appearances. Who appears for the applicant?

Mr. Leuck: If the Court, please, my name is Howell Leuck; I am appearing for the applicant.

[fol. 33] Exam. Borroughs: And your address, please, sir?

Mr. Leuck: 840 Leader Building, Cleveland.

Exam. Borroughs: Are you a practitioner before the Interstate Commerce Commission?

Mr. Leuck: I am not, your Honor, but I request permission to appear for this proceeding.

Exam. Borroughs: Have you practiced before the Commission prior hereto?

Mr. Leuck: I have not.

Exam. Borroughs: Do you intend to practice subsequent hereto?

Mr. Leuck: I do.

Exam. Borroughs: I suggest you make application in the proper manner with the Commission. You will be permitted to enter an appearance at this time.

Any other appearances for the applicant?

(No response.)

Exam. Borroughs: Any appearances for protestants?

Mr. Stacy: Henry P. Stacy, Detroit, and T. J. Minich, 314 Michigan Central Station, Detroit, Michigan, appearing for Central Freight Association Lines as protestants. And Mr. Harold G. Hernly for Rail Carriers Central Freight Association Territory as protestants. I am a registered practitioner before the Interstate Commerce Commission.

Exam. Borroughs: You appeared in the prior hearing, [fol. 34] did you, sir?

Mr. Stacy: I did, your Honor.

Exam. Borroughs: And you are appearing for the same parties?

Mr. Stacy: Yes.

Exam. Borroughs: Any further appearances?

Mr. Adomeit: Howard H. Adomeit for the Transamerican Freight Lines as protestants.

Exam. Borroughs: What is your address, please?

Mr. Adomeit: 2259 Orange Avenue, Cleveland, Ohio.

Exam. Borroughs: Are you a practitioner before the Interstate Commerce Commission Board?

Mr. Adomeit: I am not. My application is in and has not been denied.

Exam. Borroughs: But, you have filed an application?

Mr. Adomeit: It is filed.

Exam. Borroughs: The next appearance?

Mr. Furman: Mr. Furman representing the Motor Carriers Tariff Bureau. I have applied for a permit to be a practitioner before the Interstate Commerce Commission.

Exam. Borroughs: What is your address, Mr. Furman?

Mr. Furman: 1714 Woodland Avenue.

Exam. Borroughs: You say you filed an application for admission to the Commission Bar?

Mr. Furman: That is right.

[fol. 35] Exam. Borroughs: Has that application been acted upon?

Mr. Furman: It was acted upon, but was denied because I hadn't had any experience, or hadn't had any experience before the Interstate Commerce Commission. They gave me an option of appearing for any person.

Exam. Borroughs: I note that in a letter addressed to you, Mr. Furman, from Commissioner Atchison that here is the following statement: "The Commission, however, will permit you to appear and represent a client when you are able to obtain one for the purpose of giving the Commission an impression of your qualifications and ability to represent others". On the basis of that statement, you will be permitted to appear at this time.

Mr. Furman: Thank you.

Exam. Borroughs: The next appearance, please?

Mr. Kuhner: J. J. Kuhner, 1714 Woodland Avenue. Application for the right to practice before the Interstate Commerce Commission applied for, but not acted upon.

Exam. Borroughs: Did you give your address?

Mr. Kuhner: 1714 Woodland Avenue.

Mr. Leuck: Who do you represent?

Exam. Borroughs: The same client that Mr. Furman represents.

Have you filed a petition for intervention in this case?

[fol. 36] Mr. Kuhner: I hand them to the court at this time.

Exam. Borroughs: Mr. Adomeit, do you have a petition of intervention at this time for the record?

Mr. Adomeit: Yes, I do.

Mr. Minich: Mr. Examiner, I would like to make some qualifications. I am appearing for the New York Central Railroad, one of the C. F. A. protestants Carriers. I am not

permitted to practice, but I am appearing for the New York Central System.

Exam. Borroughs: You are an official of that company?

Mr. Minich: Yes.

(Discussion off the record.)

Exam. Borroughs: Are there any other appearances at this time, either for protestants or interveners?

Mr. Leuck: If the Court please, I would like to move to strike the intervening petitions of the Transamerican Freight Lines, Inc. and the Motor Carriers Tariff Bureau, on the ground that they show on their face that there is no new matter to which they apply. That all the matters to which these intervening petitions are directed were adjudicated at prior hearings of which they had notice.

Exam. Borroughs: Will you read that to me, Mr. Reporter?

[fol. 37] (Last statement of counsel read by the reporter.)

Mr. Leuck: And at which they failed to appear, and made no appearances.

Exam. Borroughs: I might ask Mr. Adomeit and Mr. Furman at this time whether they are appearing as protestants or as interveners?

Mr. Furman: Your Honor, I am appearing as intervener, not as a protestant in this case.

Exam. Borroughs: Do you intend to take active part in this case?

Mr. Furman: Perhaps, if the case goes that way, I will take active part, otherwise I will just sit in.

Exam. Borroughs: The motion will be overruled, the appearances may be entered in this case.

All right, counsel, call your first witness, unless you desire to make a statement for the record prior to your testimony.

Mr. Leuck: If the Court please, it isn't clear in my mind what the issues are here. We have the report to which your Honor referred in the opening statement, and which was made, as I understand, after a full hearing, and it is not clear in my mind what issues are drawn here this morning; could I ask for some enlightment on that subject?

Exam. Borroughs: The order of the Commission doesn't designate specifically what the issues are, as you know, [fol. 38] counsel. However, it is the Examiner's under-

standing, and he now rules that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of receivership of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding, you may proceed.

Mr. Leuck: All right. I call Mr. Resnick.

JOSEPH R. RESNICK, was sworn, testified as follows:

Direct examination.

By Mr. Leuck:

Q. State your full name.

A. Joseph R. Resnick. R-e-s-n-i-c-k.

Q. And your place of residence?

A. 3700 East 154th.

Q. Now, you were formerly employed by the Gregg Cartage and Storage Company?

A. I was.

Q. Up to what time?

A. Up to October 5, 1937.

Q. In what position?

A. An accountant.

Q. Then, during the year 1937 up until October 15th, you [fol. 39] continually were in the employ of the company?

A. I was.

Q. Did you have charge of insurance matters?

A. I did.

Q. As of approximately October 1, 1937, with what companies did the Gregg Cartage and Storage Company carry the policies which were required at that time by the Public Utilities Commission of Ohio and the Interstate Commerce Commission?

A. They carried Public Liability and Property Damage with the Auto Mutual Insurance Company, New York; and they carried Cargo insurance with the Automobile Insurance Company of Hartford, of the Aetna Group.

Q. Now, when did they discontinue that insurance, if they did?

A. They didn't discontinue.

Q. Well, how long were they insured with that company?

A. They were insured with the company until the day of receivership.

Q. Now, as to the Central Mutual Insurance Company; when did they discontinue their insurance contract with the Central Mutual?

A. December 31, 1936.

Q. And for what reason, if you know?

A. There were rumors that the Central Mutual Insurance [fol. 40] Company were going into bankruptcy, and we were advised that they were failing to take care of various accidents and claims that were arising from accidents during the time we were insured with the Central Mutual Insurance Company from October, 1935 to December 31, 1936.

Q. Then, you abandoned your contract with the Central Mutual and entered into a contract with the Auto Mutual about when?

A. January 1, 1937.

Q. And did the company pay the advance premiums required by the Auto Mutual?

A. We did.

Q. And did it continue to be insured by the Auto Mutual then until the time of receivership?

A. It was.

Q. Now, the policies in the Auto Mutual were accepted by the Utilities Commission of Ohio and Interstate Commerce Commission?

A. It was.

Q. Now, if you know, what happened to the Auto Mutual Insurance Company?

A. From my knowledge, I understand that the Auto Mutual Insurance Company subsequently also went into receivership; that was after the Gregg Cartage and Storage Company had gone into receivership.

[fol. 41] Q. And the Central Mutual Insurance Company?

A. They were adjudicated—they went into bankruptcy January 11, 1937 and stopped paying any claims whatsoever.

Q. Now, do you know when the Gregg Cartage and Storage Company received notice of bankruptcy of the Central Mutual Insurance Company?

A. It was on or about January 11, 1937.

Q. And what, if anything, did the Gregg Cartage and Storage Company do about that?

A. We immediately turned our entire file of the Central Mutual Insurance Company over to our attorneys, Leuck, Wenrick and Helm, who were instructed to proceed to see what they could do with all the various causes that were pending that the Central Mutual had not taken care of.

Q. Do you know whether the Gregg Cartage and Storage Company ever discontinued operations?

A. They did not.

Q. During the year 1937?

A. The Gregg Cartage and Storage Company itself did not discontinue operation.

Q. At no time?

A. No.

Q. You don't mean that they continued operations after the receiver was appointed in Federal Court in Bankruptcy?

A. No; they continued operation during the State re-
[fol. 42] ceivership, but not during the Federal receivership.

Q. That is, they continued operations up to and until the appointment of a receiver in Federal Court?

A. That is right.

Mr. Leuck: That is all.

Exam. Borroughs: Any cross examination?

Cross-examination.

By Mr. Stacy:

Q. Who filed the petition in the Common Pleas Court of Ohio for receivership for the Gregg Cartage and Storage Company?

A. My recollection is I think it was Mr. Leuck.

Q. You mean counsel for the applicant, for the Gregg Cartage and Storage Company?

A. I don't think it was for Gregg—I think it was for——

Q. Do you really know?

A. Yes, I do.

Q. Who was it for?

A. It was for a party from Rochester who had a personal injury claim against the Gregg Cartage and Storage Company.

Q. He filed this petition for the appointment of a receiver in the Common Pleas Court in Ohio?

A. That is right.

Q. That was on October 4, 1937?

A. That is right.

Q. How long did the receiver continue the operations of [fol. 43] the applicant, the Gregg Cartage and Storage Company?

A. You mean the State receiver?

Q. Yes.

A. Continued operation until the Federal receiver took over.

Q. What date was that?

A. On or about October 30, 1937.

Q. The petition of bankruptcy was filed in the United States District Court for the northern district of Ohio, eastern division, against the Gregg Cartage and Storage Company on October 5, 1937, isn't that correct?

A. That is right.

Q. But notwithstanding that petition, the State receiver continued the operation until the trustee in bankruptcy appointed in the United States District Court could control the property October 27, 1937, is that correct?

A. No, that is wrong.

Q. What is the correct date then?

A. The State receiver continued operation until October 30 when the Federal receiver took over.

Q. On the Federal receiver taking over under the bankruptcy proceedings on October 30, 1937, the operations of the Gregg Cartage and Storage Company were discontinued, were they?

A. That is right.

[fol. 44] Q. Have they been discontinued up to this date?

A. The operation as carrying freight has been discontinued, but the——

Q. Yes, then the carrying of freight since October 7, 1937 and up until the present date——

A. Not to my knowledge.

Q. Has there been any disposition of the assets of the Gregg Cartage and Storage Company in the United States District Court to this time?

A. They have been liquidated.

Q. Has there been any sale of any claimed operating rights of the Gregg Cartage and Storage Company? I mean by operating rights, any rights that that company may have under any provisions of the Motor Carrier Act?

Mr. Leuck: I object, your Honor. The record is the best evidence of that, the bankruptcy records.

Exam. Borroughs: Read the question to me, Mr. Reporter.

(Last question was read by the reporter.)

Exam. Borroughs: Do you know, witness, can you answer that question?

A. They have been; they have been sold.

Exam. Borroughs: The answer will stand.

Q. Whom have they been sold to?

A. They were sold to the Northwestern Transportation [fol. 45] Company.

Q. Was that a new corporation organized to take over these rights and engaged in business?

A. It was a new company, but I don't know if it was just organized to take over these rights.

Q. Had that company theretofore operated as a motor carrier?

A. No.

Q. Has that company engaged in any operations to date?

A. I don't know. I am not connected with that company.

Q. You know the outfit; the names of the officers of that company?

A. I don't know them now.

Q. Do you know——

Mr. Leuck: I object, your Honor, because the record shows the certificate hasn't been transferred to that new company.

Exam. Borroughs: The witness said he doesn't know, counsel, so your objection isn't necessary.

The next question, please.

By Mr. Stacy:

Q. Do you know whether that company is incorporated, and if so, under the laws of what State?

A. It is incorporated under the State of Ohio.

Q. You know nothing about its operations since its incorporation, is that correct?

[fol. 46] A. That is right.

Mr. Stacy: I believe that is all.

Exam. Borroughs: Any other cross-examination?

(Discussion off the record.)

HOWELL LEUCK was sworn, testified as follows:

Direct examination.

By Mr. Borroughs:

Q. Will you state your name and address, please, for the record?

A. Howell Leuck, 840 Leader Building, resident, Lakeshore Hotel, Cleveland, Ohio.

Now, should I just proceed in a narrative way, if the Court please?

Exam. Borroughs: If you will, please, sir.

Mr. Leuck: Earlier in the month of October, 1937, approximately the fourth of October, I think, the affairs of the Gregg Company, due to the failure of the Central Mutual Insurance Company, had reached the point where we felt some action should be taken towards the receivership. Previously a judgment had been obtained in Rochester, New York in the case of a party by the name of Barton versus the Gregg Cartage and Storage Company for two thousand dollars. We had been paying that judgment on an installment plan, and I had an arrangement with the attorney for [fol. 47] the plaintiff that he would cooperate with us with a view to doing anything that he reasonable could do to conserve the assets of the Gregg Cartage and Storage Company. He therefore authorized me and my associate counsel, Mr. Glen Schwartz of the Guardian Building, Cleveland, Ohio, to take suitable steps to procure the appointment of a State receiver with permission to operate the business. Now, prior to that and for some months prior to that, we in my law office had been contending with approximately one hundred and seventy-five claims that grew out of the failure of the Central Mutual Insurance Company. In Youngstown, Ohio in the case of Niclou versus the Gregg Cartage and Storage Company a judgment had been recovered for fourteen thousand five hundred dollars. We had paid off on that judgment approximately four thousand dollars and had

given a cognovit note for an additional thousand, and, of course, were amenable to execution as to the balance; being unable to give a supersedious bond in the case; we have an appeal pending, but were at any time liable to an attachment and execution. Now, the cases which were turned over to us after a very thorough investigation and expenditure of a large amount of money for railroad fare, employment of counsel in other cities, we eventually estimated that they could be settled for a cash sum of between twenty and forty thousand dollars, which would have included attorneys' fees [fol. 48] and other expenses. Mr. Gregg of the Gregg Cartage and Storage Company would have been able to take care of any ordinary obligations of the company; the extraordinary obligation on being compelled to pay advance insurance premiums to the Auto Mutual Company in order to secure insurance coverage when that company failed or when the Central Mutual failed, but he was unable to meet the responsibility of attempting to pay the various claims which were accruing in these approximately one hundred and seventy-five lawsuits throughout the country. Some of these lawsuits presented very serious liabilities; in one of the cases from New York City the plaintiff was a student of Cornell who had had both legs broken seriously and in that same accident there were four people seriously hurt, one person I think having lost the sight of one eye and was threatened with the loss of the other eye. In Michigan City there were cases pending involving three or four people where the possible judgment in the case would have been fifty thousand dollars for all of the cases. Now, there were probably fifteen cases of very serious character involving possibility of heavy judgments, but we estimated in view of all the cases and after a careful survey that if we had had not less than twenty thousand and not more than forty thousand dollars, these claims could have been met. We attempted to stay proceedings; we used all the legal devices that could be honorably used in order to keep the company in [fol. 49] business. We finally reached the conclusion that in justice to the creditors and in the interest of sound public policy, the Gregg Company should ask for a receivership which would stay legal proceedings, except as permitted by the Court and under those circumstances we could operate.

On the fourth of October, 1937 on a petition I was appointed receiver in Common Pleas Court. Will you give us the number, please?

Mr. Resnick: 468443.

Mr. Leuck: And I functioned as receiver in that court until the thirtieth of October, 1937 at which time an involuntary petition in bankruptcy was filed and the Federal Court in case number——

Mr. Resnick: 45026.

Mr. Leuck: —appointed a custodian receiver without authority to operate. Subsequently as testified to by Mr. Resnick, the certificate of this company was sold to another company, and after communication with the local representatives of the Interstate Commerce Commission, and on their advice, and in view of the fact that while a favorable report had been given the Gregg Company, but final action had not been taken, and on advice of the local representative, I advised the Gregg Cartage not to operate until this matter had been finally determined.

That concludes my statement.

[fol. 50] Mr. Resnick: Didn't you advise the Northern Transportation——

Mr. Leuck: Yes; I advised the company which had bought the certificate not to operate until a final determination.

Exam. Borroughs: Does that complete your statement?

Mr. Leuck: Yes, sir.

Exam. Borroughs: Any examination of this witness?

Mr. Stacy: I would like to ask a few questions.

Cross-examination.

By Mr. Stacy:

Q. Witness, was this receivership in the State Court a voluntary receivership?

A. Yes, it was.

Q. And you were appointed as the receiver?

A. I was.

Q. At that time what was the amount of the indebtedness of the Gregg Cartage and Storage Company, not arising out of these hundred and seventy-five suits, which you claim, I believe, were due to personal injury cases?

A. Why, I have to rely somewhat on my recollection, but as I recall it, I estimated the total assets of the Gregg Cartage and Storage Company at two hundred and fifty thousand dollars, and the total liabilities, not including the Central Mutual claims, at approximately one hundred thousand dollars.

Q. You had a statement of properties of the company on [fol. 51] which you had based these statements?

A. We had had some occasion to go into that, for a short time prior to the receivership, and the assets, for instance, would include a claim against the Monarch Insurance Company.

Q. In what amount?

A. (Continuing) —and Sun Insurance Company. Both responsible companies, for approximately thirty thousand dollars, and that represented claims that the Gregg Company had already paid to customers in order to hold their good will and not under any execution, but in reliance upon the character of the company that had the insurance; and I am quite sure the trustee in bankruptcy will collect against those two companies the amount of that claim because the defense —if you want me to go that far?

Exam. Borroughs: Yes.

A. (Continuing) The defense of the Monarch and Sun in those cases is purely technical; it revolves entirely around the ten-day provision of the Utilities Commission of Ohio as to claims arising within the ten-days.

Q. Do I understand that of the two hundred and fifty thousand dollars, thirty thousand dollars then represents claims against two insurance companies?

A. That is my recollection.

Q. What does the balance of the two hundred—what did [fol. 52] the balance of two hundred and twenty thousand dollars asset consist of at that time?

A. Well, there was another claim against the Sears Roebuck Company of Chicago, which I believe it can be fairly stated it is merely a matter of auditing and bookkeeping, and is approximately—and, of course, I am just using my best recollection—about twenty thousand dollars.

Q. Is that transportation charges?

A. That is for transportation of freight, and that is for claimed losses as to which I understand the auditors have recovered the receipt for goods received in good order. The auditors to the trustees.

Q. Can you itemize the balance of the assets in a general way, if not specifically?

A. I think the accounts receivable is generally about one hundred thousand dollars, and may have been more, but I think that is a fair approximation; that is, all accounts receivable.

Q. And what did the remaining one hundred thousand dollars asset consist of?

A. Now, I wouldn't be clear as to that.

Q. There were no vehicles, motor vehicles, included in those assets, were there?

A. There were some, but I don't think very many; there were some that were mortgaged, but I think there was a [fol. 53] clear equity in it. There was considerable office equipment, of course, which is probably subject to radical depreciation. But there is necessarily in that business, there is considerable such equipment.

Q. Now, the liability of one hundred thousand dollars, what did they consist of?

A. You mean the account receivable?

Q. Filed by the voluntary receivership?

A. The liability of the company?

Q. That is it.

A. Well, I think there were bank loans of twenty or thirty thousand dollars. I think there were insurance premiums of approximately twelve or fifteen thousand dollars. It would be very hard without the figures, I am sure. We have got the complete statement of that.

Q. How much, if any, was owing to the owner-operators that have hauled the freight, do you know?

A. No, I don't. There was some owing to them.

Q. Did that consist of a substantial part of this one hundred thousand dollar liability?

A. I don't recall the amount, but I don't think so.

Q. Do you know the gross amount of the suits, these one hundred and seventy-five suits against the company?

A. Well, the maximum for damages prayed, I would estimate that around two hundred thousand dollars. That is [fol. 54] purely an estimate. Many of these cases I think they asked for judgment of seventy-five thousand dollars, fifty thousand dollars.

By Exam. Borroughs:

Q. Are those personal injury cases?

A. I have a file on each one of them.

By Mr. Stacy:

Q. Have you that file here?

A. It is a steel file with a complete file on each individual case. It is in my office.

By Exam. Borroughs:

Q. Are those personal injury cases?

A. Yes, most of them; some are property damage.

Q. How many cases are there of that character?

A. Personal injury and wrongful death?

Q. That is right.

A. I would say twenty-five or thirty pending, and there were approximately one hundred and seventy-five potential claims of the kind that we had to file with the receiver in Chicago in order to protect our insurance as against the receiver. That is, they were claims, reports of accidents, or letters that had been received filing a claim; there were about that total that we thought should be filed with the receiver to protect it.

Q. Have the reports of those accidents been made to the Interstate Commerce Commission?

[fol. 53] A. I don't know.

Q. Would you be in a position to know that?

A. I could find it out, I probably could.

Exam. Borroughs: All right, counsel.

By Mr. Stacy:

Q. When did these claims arise that were not paid by the insurance company; what is the earliest date?

A. Well, the insurance company had filed answers in all these cases that were pending up until the time they had failed.

Q. Now, what insurance company was that?

A. Central Mutual Insurance Company, and the receiver appointed by the State Insurance Department of Illinois was Henry G. Miller. Mr. Miller, under the laws of Illinois, took the position that the company would not defend any of the cases, and so advised the policy holders. It then became necessary to immediately secure counsel in every city in which a suit was pending, and take proper action to defend the case.

Q. And when you were appointed receiver, were there also claims pending against the applicant that might have been covered by a subsequent insurance policy?

A. I don't think so at any time that I know of.

Q. So that all of these one hundred and seventy-five suits which you have mentioned——

A. Well, they are not all suits; some of them are just [fol. 56] claims.

Q. Claims?

A. Yes.

Q. Well, all of those claims you would expect to have been adjusted by this Central Mutual Insurance Company?

A. Yes.

Q. Now, what was the amount of the policy which the applicant held in the Central Mutual Insurance Company?

A. Would it be all right if I inquire?

Exam. Borroughs: Off the record, you could inquire.

(Discussion off the record.)

Exam. Borroughs: Now, on the record.

A. The policy provided for twenty-five thousand dollars coverage for personal injury or death as to any individual, and the maximum of fifty thousand dollars as to any claim involving more than one individual, growing out of the same transaction; and for property damage, coverage of five thousand dollars.

By Mr. Stacy:

Q. Do I understand by that that there was no total liability of the insurance companies set out in the policies for all accidents under the policy?

A. That is my understanding.

Q. Have you the policy here?

A. No, I do not.

Q. Do you know whether the company reserved the right [fol. 57] to terminate the policy, and if so, on what notice?

A. Yes; there was a reservation, but I don't recall what the notice was.

Q. Could you furnish the Commission in exhibit form a detailed statement of the assets and liabilities of the applicant as of the date which you filed the applicant's petition in voluntary receivership in the State of Ohio?

A. Yes.

Q. Would you do that?

A. I would be glad to.

Q. Who filed the petition in involuntary bankruptcy against the applicant?

A. The petition was filed by two attorneys, Joseph G. Ehrlich, who was a Federal receiver, and now attorney for the trustee, and Irving Kane, Union Trust Building, but I don't recall the names of the three creditors; they were small creditors.

Q. Do I understand correctly that was an involuntary petition in bankruptcy?

A. Yes. That was not the result of any arrangement; that was done over strenuous protest. We didn't think the State receiver had had enough opportunity to see what he could do, and it took more than a couple of weeks for the receiver to find out a little bit about the business.

Q. Did you file the applicant's schedule of assets and [fol. 58] liabilities in the bankruptcy proceedings?

A. No; that was filed by Mr. William M. Durkin, who was in my office.

Q. Are you familiar with those schedules?

A. I had very little to do in the preparation.

Q. Do you know the amount of assets and liabilities set forth in those schedules?

A. I do not.

Q. Could you file with the Commission in this case copies of those schedules?

A. Yes.

Q. Will you do that?

A. Yes.

Mr. Stacy: That is all right now.

Exam. Borroughs: Counsel, are you asking the witness to do that, or are you asking the permission of the Examiner to have that done?

Is it your understanding, witness, that you have to do that?

Mr. Leuck: It is not my understanding.

Exam Borroughs: That is correct.

Mr. Stacy: Well, I would like to ask the permission to require the applicant to file with the Commission in this case a statement of the applicant's assets and liabilities as of the date that this witness filed the voluntary receivership pe- [fol. 59] tition in the Ohio Court, and also a copy of the

schedules of assets and liabilities filed by the applicant in the involuntary bankruptcy proceedings in the United States District Court in the northern district of Ohio, eastern division.

Exam. Borroughs: What is the purpose of that statement, counsel; what do you want to show the Commission by such a statement?

Mr. Stacy: I want to show the Commission by those two statements the financial status of the applicant as of the time its operations were discontinued; to show whether they were then a going concern or a firm that was about to go into bankruptcy, apart from any of these claims that the insurance companies failed to file.

Exam. Borroughs: On the basis of that statement, the Examiner will order those statements as indicated by the counsel, filed for the record. They will be identified at this time as Exhibits 35 and 36. They are to be submitted for the record within a period of ten days; is that all right with you, Witness?

The Witness: Yes.

Exam. Borroughs: Now, I would like to ask a few questions.

By Exam. Borroughs:

Q. Do you have any official connection, or did you represent the applicant in this case prior to the time you were [fol. 60] appointed receiver?

A. As attorney.

Q. As attorney?

A. Yes. The State Court was fully advised of that, and subsequently the Federal Court, I think, would have appointed me, if I had requested, as receiver, even though I had been an attorney for them.

Q. And subsequent to the time that your receivership ceased, you again assumed the position of attorney for the applicant, isn't that correct?

A. Yes.

Q. During your receivership, did you have authority from the Court to continue the operation?

A. During my receivership I was authorized to continue operations.

Q. You made a statement to the effect that the Federal Court failed to give such authority to the Federal receiver; how do you know that?

A. I have a copy of the order appointing a Federal receiver; a journal entry. As part of the record in this case, case 45026, the language of the Court is: "It is ordered in reference to the receiver that he take charge of all the assets and preserve the same pending the election and qualification of a trustee", which contends, in our jurisdiction, that makes him only a custodian receiver with the authority to [fol. 61] preserve the assets.

Q. That is your opinion based upon your legal knowledge of the present law?

A. And experience in practicing in this district. And it was so construed in this case.

Q. Is there a copy of that order in the docket, do you know?

A. There is, your Honor.

Exam. Borroughs: Off the record.

(Discussion off the record.)

Exam. Borroughs: On the record.

By Exam. Borroughs:

Q. I will request the witness in this case to furnish for the record a certified copy of the order referred to by him, and it will be marked for identification at this time as Exhibit Number 37 and submitted for the record within a period of ten days at the close of the hearing.

Mr. Stacy: I assume, your Honor, that the order requires as usual with reference to exhibits, that protestants be furnished copies of exhibits?

Exam. Borroughs: That is a fact, and this witness understands that.

The Witness: Yes, I do.

Exam. Borroughs: All exhibits in this case, copies thereof, will be furnished parties entering appearances in this [fol. 62] case.

The Witness: Yes.

By Exam. Borroughs:

Q. Mr. Leuck, you stated that during your receivership you continued operation, is that correct?

A. Yes.

Q. But, as I understand it, only to the extent that freight already on the platforms of your company was transported to final destination?

A. That is true.

Q. You accepted no additional shipments?

A. That is true.

Q. No business was received?

A. No, no. I notified all——

Q. And the main purpose of the receiver was to close up pending business of the company, is that correct?

A. Well, of course, when I was appointed, I knew nothing about this business in a practical way.

Q. Answer my question, please, sir, first, before you explain it.

A. No, I would say "no", that wasn't the purpose. The purpose was to save the business and keep it going if possible.

Q. But, you accepted no new business?

A. The first thing I did was to accept no new business until I could look around and get my bearings.

[fol. 63] Q. Did you at any time accept new business after you were appointed a receiver?

A. No. And that was almost entirely because of the insurance angle. Whatever freight I moved, I took out individual policies for that load, and this continued until I could look around. But delivered all the freight we had.

Q. During your receivership, were there any trucks or equipment sold or disposed of?

A. No, not to my knowledge.

Q. Now, at the time the original hearing was held in this case, there were twenty-five trucks and five tractors and trailers owned by the applicant, were those still owned at the time you received your receivership?

A. Well, I sold nothing.

Q. You didn't answer my question.

A. I can't answer your question.

Q. You don't know?

A. I am quite sure nothing was sold.

Q. And you are not in a position to testify what happened to that equipment subsequent to the time you ceased your connection as the receiver with the company, or are you?

A. Not subsequent, no.

Q. That would be entirely within the knowledge of the receiver under the Federal Act, is that correct?

A. Yes, sir.

[fol. 64] Q. And your connection as attorney for that company today wouldn't give you that knowledge, is that a fact?

A. Yes, that is true.

Q. Would Mr. Gregg know that?

A. He might.

Q. Do you know whether an application was filed with the Interstate Commerce Commission for the acquisition of applicant's rights and property by the Northeastern Transportation Company?

A. Yes, I think there was such an application.

Q. On what form was that application filed, do you know?

A. I don't know.

Q. Do you know whether it was a BMC 21 or 26, or what form it was?

A. I didn't handle that.

Q. You didn't file that form.

A. No.

Q. Do you know who did?

A. I think Mr. Durkin or Mr. Lockhart who is here. Mr. Lockhart who is present at the table—indicating Mr. Lockhart—was the counselor of the company in these matters. He spent all his time on questions of public utility.

Exam. Borroughs: This is off the record.

[fol. 65] (Discussion off the record.)

Exam. Borroughs: Are there any further questions of this witness?

Mr. Stacy: If your Honor, please, I didn't quite understand whether Mr. Lockhart's statements had been incorporated on the record or whether they were made off the record?

Exam. Borroughs: Mr. Lockhart's statements had been off the record, but the Examiner expects to call Mr. Lockhart to the stand.

Mr. Stacy: No further questions.

Exam. Borroughs: Mr. Lockhart, will you come up here, please?

HENRY A. LOCKHART was sworn, testified as follows:

Examination.

By Exam. Borroughs:

Q. Will you state your full name for the record?

A. Henry A. Lockhart.

Q. And your address, please?

A. 905 East 149th Street, Cleveland, Ohio.

Q. Were you at one time connected with the Gregg Cartage and Storage Company?

A. I was.

[fol. 66] Q. And during this period of time, what official capacity did you have?

A. Superintendent of transportation, and in charge of their applications for State Public Utilities Commission and Interstate Commerce Commission.

Q. Did you file for the applicant Company an application with the Interstate Commerce Commission for substitution of another carrier in place of it?

A. I did.

Q. And on what form was that filed?

A. On BMC 26.

Q. And what was that other carrier which sought to take over the Gregg Cartage and Storage Company?

A. Northeastern Transportation Company.

Q. How many vehicles were involved at that time?

A. In the transfer?

Q. Yes, sir.

A. Let's see the record, please. (Looking at papers) Well, the new company was--there was five trucks and ten tractors and thirteen trailers. It was the property that the Northeastern Transportation Company was to put in operation at that time.

Q. Do you know where they acquired those trucks?

A. Yes, I know where some of them were acquired.

[fol. 67] Q. Were they previously owned by the Gregg Cartage and Storage Company?

A. No. Those were not owned by the Gregg Cartage and Storage Company; they were owned by individual contractors, some of whom had worked for the Gregg Cartage and Storage Company.

Q. Now, what happened to the twenty-five trucks and five tractors and trailers that were originally owned by the Gregg Cartage and Storage Company?

A. As I recall, those trucks and trailers were replevined by the Morris Plan Bank prior to the State receivership.

Q. In other words, they had been financed through the Morris Plan Bank, is that correct, and they took them back when the applicant was unable to meet the payments on them?

A. Yes, sir.

Q. And that occurred prior to the State receivership?

A. Yes, sir.

Q. In so far as you know?

A. Yes, sir.

Q. When did you actually cease your connection with the Gregg Cartage and Storage Company?

A. Well, I ceased with the Gregg Cartage and Storage Company on the date of the State receiver. I was assistant to the State receiver, and also assistant to the Federal receiver up until about December 4th.

[fol. 68] Q. Are you connected in any way with the Gregg Cartage and Storage Company?

A. Not with the Gregg Cartage and Storage Company; no, sir; I have been appointed and was appointed by the Federal Court to make a couple of audits for the attorney for the trustee.

Q. Are you connected today with the Northeastern Transportation Company?

A. No, sir.

Q. Is that a corporation, do you know?

A. It is a corporation; yes, sir.

Q. Do you know when it was incorporated?

A. It was incorporated in—no, I can't give you the exact date of incorporation.

Q. Approximately, do you know?

A. Yes, I think it was in December, 1937.

Q. Who were the officials of that corporation, do you know?

A. At the time of the incorporation?

Q. At the present time.

A. No, I don't know who the officials are at the present time.

Q. At the time of this incorporation, who were they?

A. The incorporator, I couldn't tell that; that was handled [fol. 69] by Mr. Leuck's office. We could get the original——

Mr. Leuck: He means the officers.

By Exam. Borroughs:

Q. Let's stick to the officials right now; do you know who the officials were, the president, vice-president, treasurer and so forth?

A. The president at that time of incorporation was Mr. Shear; I. J. Shear of Pittsburgh, Pennsylvania, and I was vice-president and treasurer at that time, and Mr. Carl Wolza was secretary. I believe that was the status of the official set-up.

Q. Do you know who the incorporators were?

A. No, I couldn't tell you that. The incorporation papers were handled by Mr. Leuck.

Q. Mr. Leuck would know that?

A. His office would; I don't know whether he himself would know personally or not.

Exam. Borroughs: Any question of this witness by either the applicant's counsel or by protestants' counsel?

Direct examination:

By Mr. Leuck:

Q. Mr. Lockhart, you, of course, don't know of your own knowledge when the Morris Plan replevin was filed?

A. No, sir; I do not.

Q. You are merely testifying from your recollection?

A. Yes, sir; that is it.

[fol. 70] Q. But it was approximately at the time of the appointment of the State receiver?

A. It was either there or a short time prior to that time.

Mr. Leuck: That is all.

Exam. Borroughs: All right, sir.

Cross-examination:

By Mr. Stacy:

Q. Do I understand correctly, Mr. Lockhart, that you were not one of the incorporators of the Northeastern Transportation Company?

A. No, sir; I was not one of the incorporators. I did not sign the application to the Secretary of State as an incorporator.

Q. Do you own any stock in that company?

A. I have some stock in it; yes, sir.

Q. Mr. Gregg, Joseph Gregg, is an officer of that company?

A. No, sir; he is not.

Q. Is he a stockholder in that company?
A. No, sir; not to my knowledge.

Mr. Stacy: That is all.
Exam. Borroughs: You are excused, sir.
I would like to call Mr. Gregg to the stand, please.

JOSEPH GREGG was sworn, testified as follows:

[fol. 71] Examination.

By Exam. Borroughs:

Q. Give your name for the record, please.
A. Joseph Gregg.
Q. And your address, please.
A. 2390 Lee Road.
Q. Mr. Gregg, at the present time, do you have any interest in the Northeastern Transportation Company?
A. No, sir.
Q. Neither through stock ownership or any other interest whatsoever?
A. No, sir.
Q. Were you one of the original incorporators of that company?
A. No, sir.
Q. Can you tell the Examiner what happened to the twenty-five trucks, five tractors and trailers which the company owned at the time of the original hearing of this case?
A. No. After the receivership took place on October 5, why, it was just left up to the attorneys hands, and I don't know just what happened.
Q. Were those trucks still owned by the Gregg Cartage and Storage Company at the time that the receiver took over?
A. I presume so.
[fol. 72] Q. Do you know?
A. At the time the receiver took over?
Q. Yes.
A. Yes, they were.
Q. They were owned at the time the receiver took over?
A. Yes.
Q. And you wouldn't know what happened after that?
A. No.
Q. What connection do you have with the Gregg Cartage and Storage Company today?
A. No connection.

Q. You mean by that you don't have any connection other than whatever interest you might have in that company should there be an excess of assets over liabilities when it goes out of receivership, is that what you mean?

A. I presume so.

Exam. Borroughs: Any other questions of this witness?

Cross-examination.

By Mr. Stacy:

Q. Mr. Gregg, have you at the present time any connection with any other transportation company?

A. I am general freight agent for the Modern Cartage and Storage Company.

Q. Is that the only company with which you have any connection?

A. And the general freight agent also for the Northeast-
[fol. 73] ern Transportation Company.

Q. Any other company?

A. No, sir; no other company.

By Exam. Borroughs:

Q. Didn't you answer the Examiner's question that you had no connection or interest whatever with the Northeastern whatsoever?

A. Perhaps, I misunderstood you. No interest in the company at all, but I am employed by the Northeastern Transportation Company as general freight agent.

Q. On a salary basis?

A. Yes, sir.

Q. And again you want to state you don't own any stock in the company?

A. No, sir.

By Mr. Stacy:

Q. These trucks that the Examiner referred to were trucks that were used by the applicant in its city delivery service, were they not?

A. While——

Q. Prior to the time they were replevined?

A. Yes, sir.

Q. All the over-the-road service was carried on by trucks owned by individual contractors, as you testified at the previous hearing, were they not?

A. Yes, sir.

Q. Mr. Gregg, who are the officers of the Northeastern [fol. 74] Transportation Company at this time?

A. I. J. Shear of Pittsburgh is the president, Carl Wolza is the treasurer, as far as I know.

Q. Who were the incorporators of that company?

A. I don't know.

Q. You had nothing to do with its incorporation?

A. No, sir.

Mr. Stacy: That is all.

Exam. Borroughs: You are excused.

Mr. Leuck: Could I ask him one more question?

Exam. Borroughs: Yes, sir.

Direct examination.

By Mr. Leuck:

Q. As a matter of fact, to refresh your recollection, the Morris Plan Bank did not actually replevin the trucks?

A. No, sir.

Q. They came and got them when the application was made for State receiver?

A. That is right.

Q. Did you give them opportunity to do that?

A. No, sir.

Q. They had a mortgage on all the equipment?

A. Yes.

Q. And they were advised of the receivership?

A. That is right.

[fol. 75] Mr. Leuck: That is all.

Exam. Borroughs: This is off the record.

(Discussion off the record.)

Exam. Borroughs: On the record. Mr. Leuck, I want to ask you one or two other questions.

Howell Leuck being recalled, further testified as follows:

Examination.

By Exam. Borroughs:

Q. Mr. Leuck, what is the present status of the Federal receivership; is it still operating?

A. It is still operating.

Q. And do you have any idea when that receivership will——

A. Not within six months will it terminate.

Q. And so far as you know, operations of the applicant will not be resumed until that receivership closes, is that correct, in your opinion?

A. The applicant in this case, or Gregg Cartage and Storage Company?

Q. The Gregg Cartage and Storage Company.

A. That is true.

Q. Well, who were the applicants that you refer to now in this case; I presume you refer to the Northeastern Transportation Company?

A. Yes, sir.

[fol. 76] Q. Would they be permitted to resume operations, in your opinion?

A. We took that up with the local official of the Interstate Commerce Commission, and on his advice have not attempted to operate.

Q. Well, would the Court permit that?

A. I think it would.

Q. Federal Court?

A. I think we could obtain permission.

Q. In other words, it is your idea to go into Federal Court and ask for a supplemental order giving you that permission to operate if the Interstate Commerce Commission gave you that authority, is that correct?

A. Well, the transaction under which the Northeastern acquired this certificate I think is entirely concluded, and as far as the Court is concerned, there is no obstacle to the operating immediately except that I felt some time ago that I was giving them good advice when I told them not to operate until this entire matter was terminated.

Q. In other words, the transfer of rights alone could be absorbed and obtained by the Northeastern Transportation Company which would enable them to resume operations?

A. To do everything to be done under the certificate.

COLLOQUY

Exam. Borroughs: Are there any other witnesses, in this case, testimony or questions?

[fol. 77] (No response.)

Exam. Borroughs: Are briefs to be filed in this case?

Mr. Leuck: Now, if the Court please, can I inquire as to these exhibits once more so that I am sure I will furnish

them in the manner that you require. Exhibit 35 is a statement of the assets and liabilities of the company at the time of the appointment of the State receiver?

Mr. Stacy: That is correct.

Exam. Borroughs: That is correct. That is identified as Exhibit Number 35.

Mr. Leuck: Exhibit Number 36 will be a certified copy of the schedule of bankruptcy dates as to assets and liabilities filed in the Federal Court?

Mr. Stacy: That is correct.

Exam. Borroughs: That is correct. That is identified as Exhibit Number 36.

Mr. Leuck: Exhibit Number 37 is a copy of the order in the United States District Court for the eastern division of the northern district of Ohio appointing a receiver for the Gregg Cartage and Storage Company?

Mr. Borroughs: That is identified as Exhibit Number 37. All three exhibits will be submitted for the record within a period of ten days.

[fol. 78] Mr. Leuck: Now, if the Court please, it has been brought to my attention by the Court what is contained in this report is not necessarily a part of the record, and I therefore ask leave to also file as an exhibit the order under which the sale of this certificate, and the subsequent transfer from the Gregg Cartage to the Northeastern was ordered by the District Court in this district.

Exam. Borroughs: Will you read that, Mr. Reporter?

(Last statement of counsel was read by the reporter.)

Exam. Borroughs: Permission is granted. That will be identified as Exhibit Number 38 and submitted at the same time as the other exhibits.

(Discussion off the record.)

Exam. Borroughs: Go on the record.

Mr. Stacy: I make this request on the record, your Honor, that the applicant be required to furnish for the commission a certified copy of its insurance policy issued by the Central Mutual Insurance Company under which policy applicant alleges that there were some one hundred and seventy-five claims pending, but unpaid on account of the bankruptcy of the insurance company.

Exam. Borroughs: Counsel, will you furnish such?

Mr. Leuck: Yes, we will furnish a photostatic copy.

Exam. Borroughs: That will be identified as Exhibit Number 39 and be submitted at the same time as the other [fol. 79] exhibits.

Mr. Leuck: If the Court please, in connection with Exhibit 38 may we file with the order of sale in the District Court here of the certificate, a copy of the bill of sale issued by the trustee in bankruptcy to the Northeastern?

Exam. Borroughs: No objection to that. It will be submitted as part of that exhibit.

The Examiner is going to request that a brief be filed by applicant's counsel in this case setting out his position clearly as to the reasons why the interruption of service are beyond the control of applicant, with special reference to the period that a Federal receiver was in charge of the assets of that company. Also any citations he wants to refer to as support for his argument.

Do protestants want to file a brief in this case on the basis of that statement?

Mr. Stacy: I don't think we do, your Honor, because I think we still have an opportunity in the practice to file exceptions to the proposed report.

Exam. Borroughs: That is correct.

Mr. Leuck: What is the due day on the brief, your Honor?

Exam. Borroughs: That will be due within thirty days from the close of this hearing, please, sir.

If there is nothing else at this time, the hearing is [fol. 80] closed.

(Whereupon, at 11:40 o'clock a. m., the hearing was closed.)

[fol. 81] EXHIBIT C TO BILL OF COMPLAINT

Interstate Commerce Commission

No. MC 51204

Gregg Cartage and Storage Company Contract Carrier Application

No. MC 51088

Gregg Cartage and Storage Company Common Carrier Application

Report and order on further hearing recommended by A. F. Borroughs, Examiner

Served June 29, 1938.

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission.

We certify this to be true and exact copy of original report from the Interstate Commerce Commission.

[fol. 82] INTERSTATE COMMERCE COMMISSION

No. MC 51204 [1]

Gregg Cartage and Storage Company Contract Carrier Application

Submitted ——, ——. Decided ——, ——

Upon further hearing:

1. Interruption of service found one over which applicant has had no control.

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[1] This report also embraces No. MC 51088, Gregg Cartage and Storage Company Common Carrier Application.

2. Applicant found entitled to resume operations as a common carrier by motor vehicle of general commodities, in interstate or foreign commerce, over the routes and between the points set out in the prior report herein.

Howell Leuck for applicant.

Henry P. Stacy, T. J. Minich, Harold G. Hernly, Howard H. Adomeit, W. Furman and *J. J. Kuhner* for protestants.

Report and Order on Further Hearing

Recommended by A. F. Borroughs, Examiner

In the prior report herein,[2] served December 17, 1937, the examiner found that applicant's operations were those of a common carrier by motor vehicle of general commodities, in interstate or foreign commerce, over irregular routes, between points in Ohio, Pennsylvania, New York, New Jersey, Maryland, Massachusetts, Indiana, Michigan, Illinois and Missouri and that applicant was entitled to continue such operations by reason of having been engaged in bona [fol. 83] fide operations on June 1, 1935 and continuously since that time; that a certificate of public convenience and necessity to continue such operations should be issued and the applications denied in all other respects.

Exceptions to the recommended order were seasonably filed by protestants. On January 7, 1938, a petition for the issuance of a certificate of public convenience and necessity was filed which alleged applicant was an involuntary bankrupt under the jurisdiction of a United States District Court and that all of its right, title and interest to said certificate had been sold at public auction. By the Commission's order, entered February 11, 1938, the proceeding was reopened in respect to applicant's discontinuance of operations and a further hearing held. At the former hearing numerous rail and motor carriers opposed the granting of the applications. At the further hearing certain of the protestants did not appear.

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[2] Gregg Cartage and Storage Company adjudged bankrupt and sale of its interstate rights to Northeastern Transportation Company approved by the court December 6, 1937. Substitution of the latter for Gregg Cartage and Storage Company applied for in Docket FC 3082.

During the fall of 1937 applicant's working capital became seriously impaired when it was required to pay several damage claims after the Central Mutual Insurance Company, with which it had been insured against public liability and property damage, became insolvent. Applicant was insured against loss or damage by fire, theft or non-delivery of merchandise with the Monarch Fire Insurance Company and the Sun Insurance Company, Ltd. Through technical defenses raised by these companies applicant was forced to pay additional claims totaling $15,000.00 in order to retain the good will of its customers. In addition to the payments made by applicant it was confronted with approximately one hundred and seventy-five additional claims in varying amounts for personal injury and property damages, the total of which it estimated at approximately two hundred thousand dollars. Applicant tried to make arrangements for settling the extraordinary obligations it was obliged to meet because of the failure or refusal of the insurance companies to do so. In some of the cases extended negotiations were carried on but eventually it became impossible to satisfy the deman-s of the claim holders. Many of the personal injury claims made possible excessive judgements being awarded by the courts if they were not settled. In fairness to its creditors applicant on October 4, 1937 applied to the Common Pleas Court of Cuyahoga County, Ohio for an operating receivership. On October 5, 1937 the court appointed a receiver to take possession of the business and assets of the company. On the same date an involuntary petition in bankruptcy was filed in the United States District Court for the Northern District, Eastern Division of Ohio. On October 27, 1937, a federal receiver was appointed who took over applicant's business and assets on October 30, 1937. Under the administration of the state and federal receivers new business was not solicited or accepted and ap-
[fol. 84] plicant's activities were confined to effectuating deliveries of merchandise already on hand. Operations have not since been resumed.

On June 30, 1937, applicant's current assets were $151,548 of which $136,974 represented accounts and notes receivable and $2,731 cash in banks. Applicant's fixed assets were $42,818 including trucks valued at $32,635. Applicant's current liabilities were $130,656 consisting of accounts and notes payable and accrued payroll. Capital stock amounted to $10,000. A reserve of $30,000 was set up by applicant

for liability and claims and it had a surplus of $25,889. At the time the federal receiver took charge applicant's debts totaled $363,735 of which $14,593 represented wages, $30,248 secured claims, and $313,523 unsecured claims. Its assets amounted to $243,950 of which $95,612 represented debts on open accounts and $104,985 unliquidated claims. It is apparent applicant was solvent on July 1, 1937 and thereafter its current assets and working capital were seriously depleted.

The question presented is whether the cessation of operations for a period of approximately nine months in an interruption of service over which applicant had no control. The financial difficulties in which applicant found itself prior to its voluntary receivership do not appear to have been the result of poor business management. It appears fairly obvious that had it not been required to meet the unexpected obligations thrust upon it as the result of the failure of the insurance companies to protect it against the numerous claims involved it would not have been forced into receivership and interruption of its operations would not have occurred. As aforestated applicant on July 1, 1937 was financially solvent with cash and current assets sufficient to meet the ordinary requirements of its business. Ample reserves were carried to meet the usual claims arising. There is no evidence of poor business management or that applicant's insolvency resulted from its failure to properly conduct its business. It appears, therefore, that the interruption of service when it occurred was not within applicant's control. Whether the continued non-operation is likewise beyond applicant's control must also be considered. Applicant contends that the state receiver had insufficient time to ascertain the status of the business to enable him to resume operations had he desired. This contention has support in the fact that a petition of involuntary bankruptcy was filed on the day the state receiver took office and within the month a federal receiver had taken over control of the business. The applicant also contends that during the federal receivership, the court did not specifically authorize the receiver or trustee to continue operations. With respect to the latter contention the Bankruptcy Act specifically provides that power is vested in the courts of bankruptcy to authorize the business of the bankrupt to be conducted for limited periods by receivers, marshals, or [fol. 85] trustees, if necessary in the best interests of the

bankrupt. An order authorizing a receiver in bankruptcy to carry on the business of a bankrupt rests in the discretion of the court. *Isaacson* (N. Y. 1909) 174 F. 406, 98 C. C. A. 614. In the instant case the federal court did not specifically confer such power in its order of October 30, 1937, which reads,

"* * * that he take charge of all the assets and preserve the same pending the election and qualification of a Trustee herein, with authority to take possession of the assets, have an inventory and appraisal made, and prepare for sale."

However, the receiver may have requested such right had he deemed it advisable. *Bray v. Johnson* (W. Va. 1908) 166 F. 57, 91 C. C. A. 643. In the instant case the receiver did not seek the court's permission to continue the business but devoted his efforts to preserving and liquidating applicant's assets for the benefit of creditors. On or about November 13, 1937 the federal court authorized the receiver to sell the right, title and interest of the applicant in and to its rights under the Motor Carrier Act, 1935, and on December 1, 1937 such rights were sold at public auction to the Northeastern Transportation Company[3] for $850. Since acquisition of the involved rights, the Northeastern Transportation Company has not resumed applicant's former operations. This is apparently due to the fact that its application with the Commission for substitution in lieu of applicant has not been approved. It, therefore, has been unable to move its vehicles, file tariff concurrences or conduct a business in accord with the Commission's regulations. It is observed that Howell Leuck, appointed as state receiver by the Common Pleas Court, served as applicant's counsel for a number of years and represented it in the

[3] The Northeastern Transportation Company was incorporated to take over the good will, trade names, and certificates of Gregg Cartage and Storage Company. The latter's former president, Joseph Gregg, is the new company's general freight agent and Henry Lockhart, former superintendent of transportation for Gregg Cartage and Storage Company, is a stockholder in the new company. Other connections, if any, between the companies through their respective officials and employees cannot be determined from the record.

instant case. Henry A. Lockhart who acted as assistant to both state and federal receivers served applicant as superintendent of transportation prior to the receivership and is a stockholder in the Northeastern Transportation Company. What influence, if any, these men may or may not have been able to exercise toward the resumption of applicant's operation cannot be determined from the record.

In determining whether there was an interruption of service as contemplated under section 206 of the Motor Carrier Act, 1935, it is necessary to take into consideration not only the length of time during which the service was suspended but also the circumstances under which the interruption of service occurred. In *Black Hills Transp. Co. Common Carrier Application*, 2 M. C. C. 391, 396, the Commission stated:

[fol. 86] "* * * In determining whether there was an abandonment, the length of time during which service was interrupted, although it is an important factor, is not, in our opinion, in itself controlling. The character of the operations and the circumstances under which the interruption of service occurred should be considered."

It has already been found that the cause of the interruption of service was one over which applicant had no control. It appears equally obvious that the continued non-operation has been likewise beyond its control or that of its successor in interest. During the receiverships applicant had no voice in the matter of operation or non-operation of its business. This was entirely within the discretion of the courts and their duly appointed officers. That they chose to discontinue operations and sell whatever operating rights existed was done for the benefit of the creditors. The obstacles in the way of resumption of operations by the successor in interest have been pointed out. From the facts of record it must be concluded that the interruption of applicant's service at the time of and since its involuntary receivership is one over which it has had no control within the meaning of the act.

The examiner finds that applicant was on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes named in the prior report herein,

and is entitled to a certificate of public convenience and necessity authorizing continuance of such operation.

The appended order should be entered.

(Signature) *A. F. Borroughs*, Examiner.

[fol. 87] Recommended by A. F. Borroughs, Examiner.

(Signature) *A. F. Borroughs.*

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the —— A. D. 1938

No. MC 51204

Gregg Cartage and Storage Company Contract Carrier Application

No. MC 51088

Gregg Cartage and Storage Company Contract Carrier Application

Further investigation of the matters and things involved in this proceeding having been made, said applications upon due notice having been heard by A. F. Borroughs, Examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with sections 215 and 217 of the Motor Carrier Act, 1935, and the rules and regulations promulgated by the Commission thereunder, a certificate of public convenience and necessity be issued to the Gregg Cartage and Storage Company of Cleveland, Ohio authorizing it to operate as a common carrier, of general commodities, over the routes and between the points set out in the prior report herein.

It is further ordered, That the above-described certificate shall be issued upon the condition that the operations authorized therein shall be conducted in accordance with the rules, regulations, and requirements relating thereto

issued by the Commission under the Motor Carrier Act, 1935.

It is further ordered, That this order shall be effective on ——— —, ———.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 88] EXHIBIT "D" TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-51204[1]

Gregg Cartage & Storage Company, Common Carrier Application

Submitted July 29, 1938. Decided November 14, 1938.

1. Discontinuance of operations due to bankruptcy found to be an interruption of service over which applicant had control within the meaning of sections 206(a) and 209(a) of the Motor Carrier Act, 1935.

2. Applicant found to have failed to establish the right to a certificate or permit under the "grandfather" clauses of sections 206(a) and 209(a) of the act authorizing operation as a common or contract carrier by motor vehicle of general commodities over regular and irregular routes between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and District of Columbia. Applications denied.

3. Application for license to operate as a broker for the purpose of arranging transportation of property by motor vehicle, in interstate or foreign commerce, denied.

Dane O. Sprankle, Howell Beuck, and *W. M. Durkin* for applicant.

Taylor C. Burneson, P. J. Coughlin, E. E. Kundtz, B. W. LaTourette, Joseph F. Hays, H. P. Stacy, D. P. Connell, Howard H. Adomeit, W. Furman, J. J. Kuhner, T. J. Minich, and *Harold G. Hernly* for protestants.

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[1] This report also embraces No. MC-51088, Gregg Cartage & Storage Company Common Carrier Application and No. MC-51089, Gregg Cartage & Storage Company Broker Application.

Report of the Commission

Division 5, Commissioners Eastman, Lee, and Rogers

By Division 5:

These three applications relate to one matter, originally were heard together, and were the subject of a recommended report and order by an examiner. Exceptions to that recommended order were filed by certain protestants. Subsequently Nos. MC-51204 and MC-51088 were reopened for further hearing with respect to the discontinuance of operation by applicant, and a second recommended report and order by an examiner were issued therein. Exceptions to that recommended order were filed by protestant rail carriers, to which applicant replied. Our conclusions differ from those recommended.

[fol. 88a] All three applications were filed by the Gregg Cartage & Storage Company, a corporation of Cleveland, Ohio, on February 12, 1936. In Nos. MC-51204 and MC-51088, applicant, generally speaking, seeks certificates of public convenience and necessity under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, authorizing operations as a common carrier by motor vehicle, of general commodities, between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and the District of Columbia, over certain regular routes and otherwise over irregular routes. These two applications are in the alternative, and seek permits to operate as a contract carrier by motor vehicle if applicant's operations are found to be those of such a carrier.

In No. MC-51089 applicant seeks a license authorizing operation as a broker for the purpose of arranging transportation of property by motor vehicle in interstate or foreign commerce.

A number of motor and rail carriers opposed the three applications, but submitted no evidence.

At the time of the original hearing Joseph Gregg was president of the applicant corporation and owned all but two shares of its stock. As an individual doing business as Gregg Carloading & Distributing Company (hereinafter called the carloading company) he has been denied a license to continue operations as a broker at points in Ohio, Penn-

sylvania, New Jersey, New York, Massachusetts, Michigan, Indiana, Illinois, and Missouri in arranging transportation by motor vehicle of general commodities, in interstate or foreign commerce. See *Gregg Broker Application*, 6 M. C. C. 269.

In order that the issues presented may be understood clearly, a brief statement of applicant's method of operating is helpful. Terminals were maintained at Cleveland, New York, and Buffalo, N. Y., Boston, Mass., Detroit, Mich., Cincinnati and Akron, Ohio, Chicago, Ill., St. Louis, Mo., Indianapolis, Ind., and Baltimore and Hagerstown, Md. The necessary office help at these terminals conducted the work of both applicant and the carloading company, apparently interchangeably, but it appears that separate accounting systems were maintained for each concern and that a bank account was kept only in the name of applicant.

The carloading company assembled property at terminal points, transported it by applicant's facilities under a contract with applicant, and published a tariff naming its rates and charges. Applicant also published a tariff as a common carrier by motor vehicle and is said to have held itself out to carry for the general public, in addition to the transportation performed for the carloading company. In carrying [fol. 88b] on its transportation undertaking, applicant performed no over-the-road motor-carrier service with its own vehicles, but operated such service exclusively by the use of so-called owner-operators. The vehicles owned and operated directly by it were used in cartage work in Cleveland and vicinity. It appears that for the most part applicant's service for the carloading company consisted of carrying full truckloads of general commodities between the named terminals under bills of lading issued by that company, although it is claimed that it carried traffic in its own name and under its own bills of lading.

Applicant in 1936 was insured against public liability and property damage in the Central Mutual Insurance Company of Chicago. On December 31, 1936, after hearing rumors as to the financial condition of that company, and after that company had failed to protect it against certain damage claims, applicant placed similar insurance with Auto Mutual Insurance Company, which necessitated the payment of premiums in advance. On January 11, 1937, the Central Company was adjudged a bankrupt and ceased the payment of all claims. In the fall of 1937 applicant was forced to

pay several substantial damage claims arising from accidents during the period insurance was in effect with the Central Company. Applicant also paid additional claims totaling $15,000 for loss and damage to cargo, due to technical defenses raised by the insurance companies with which it carried cargo insurance, in order to maintain the good will of its customers. In addition to these payments, which seriously impaired its working capital, applicant was confronted with approximately 175 additional claims in varying amounts for personal injury and property damage growing out of the failure of the Central Mutual Insurance Company. The total of these claims is estimated at about $200,000, and applicant tried to make arrangements for settling them because of the failure or refusal of the Central Company to do so. In some instances extended negotiations were conducted by applicant with the claimants and some settlements were made, but eventually it became impossible to satisfy their demands.

In order to be fair to all its creditors, the filing of a friendly suit by one of applicant's creditors was arranged. On October 4, 1937, the latter filed an action against applicant in the common pleas court of Cuyahoga County, Ohio, asking for the appointment of a receiver. On October 5 that court appointed a receiver with authority to operate and conduct the business of applicant in such manner as would produce the best results. On the same day, an involuntary petition in bankruptcy was filed by certain of applicant's creditors in the United States District Court for the [fol. 39] Northern District of Ohio. On October 27, applicant was adjudged a bankrupt by that court, and on October 30, 1937, it appointed a receiver for the bankrupt estate, and ordered him to take charge of all the assets and preserve the same, pending the election and qualification of a trustee with authority to take possession of the assets, have an inventory and appraisal made, and prepare for sale. On the latter date the Federal court receiver took over applicant's business.

The State court receiver, while apparently having authority to continue operations, confined himself between October 5 and 30 to effectuating deliveries of shipments en route, no new business being solicited. On October 14, 1937, he filed a petition with us praying for authority to suspend operations without prejudice to applicant's operating rights under the "grandfather" clauses of the act. By our order

of November 30, 1937, we denied this petition, stating that we are without power to authorize such a suspension of operations. The Federal court receiver, who apparently had no authority to continue operations, confined himself to liquidating the business and, so far as this record shows, conducted no operations after his appointment.

Pursuant to court order, the goodwill of the bankrupt estate, certain of its trade names, and its rights under the applications filed with us under the act were sold by the Federal court receiver at public auction to the Northeastern Transportation Company [2] for $850 on December 6, 1937. Our files show the Federal court receiver and this company thereafter filed a joint application (No. MC-FC-3082) asking that the latter be substituted as applicant in lieu of the Gregg Cartage & Storage Company in Nos. MC-51204 and MC-51088. Final action on this application has been held in abeyance by us, pending a determination of applicant's rights herein, in view of its bankruptcy and resulting discontinuance of service; and no operations have been carried on by the Northeastern Company.

As seen, applicant claims "grandfather" rights as a common or contract carrier, and also seeks a broker's license. In this connection the examiner, on the basis of the original and further hearing, found that the described interruption in service was one beyond applicant's control, and recommended that applicant be granted a certificate to continue operations as a common carrier by motor vehicle, of general commodities, over irregular routes between certain points in Ohio, West Virginia, Pennsylvania, New York, [fol. 90] New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and the District of Columbia. Assuming, therefore, that applicant may have had "grandfather" rights

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[2] The Northeastern Transportation Company was incorporated to take over the goodwill, trade names, and certificates of Gregg Cartage & Storage Company. The latter's former president, Joseph Gregg, is the new company's general freight agent and Henry Lockhart, former superintendent of transportation for Gregg Cartage & Storage Company, is a stockholder in the new company. Other connections, if any, between the companies through their respective officials and employees cannot be determined from the record.

as a motor carrier by reason of its past operations, the first question for determination is whether the interruption of service due to its bankruptcy was one over which it had no control within the meaning of sections 206 (a) and 209 (a) of the act. If such interruption was one within its control, there is no necessity here for a determination of its claimed "grandfather" rights.

A financial statement submitted by applicant as of June 30, 1937, indicates that it was solvent on that date. At that time applicant's current assets were $151,548, of which $136,974 represented accounts and notes receivable and $2,731 cash in banks. Its fixed assets were $42,818, which included equipment valued at $32,635. Its current liabilities were $130,656, consisting of accounts and notes payable and accrued pay roll. Capital stock amounted to $10,000. It had a reserve of $30,000, set up for liability and claims, and a surplus of $25,889. After the appointment of the State court receiver, 25 pieces of equipment owned by applicant apparently were repossessed by a bank which had advanced the money for their purchase. At the time the Federal court receiver took charge, applicant clearly was insolvent. Its debts totaled $363,735, of which $14,593 represented wages, $30,248 secured claims, and $313,523 unsecured claims. Its assets amounted to $243,950, of which $95,612 represented debts on open accounts, $104,986 unliquidated claims, partly undetermined, and $18,809 cash in banks and elsewhere.

Applicant contends that its financial troubles after June 30, 1937, were not due to poor management, but rather to the failure of one insurance company and the refusal of others to provide protection in accordance with the provisions of their policies. It maintains that, except for the extraordinary obligations arising from these matters, it would have been able to continue operations; and that its involuntary bankruptcy and resulting cessation of operation clearly were not within its control.

In order for a motor carrier to receive a certificate or permit under the "grandfather" clauses of the act it must be established that such carrier or predecessor in interest was in bona fide operation as such on June 1, 1935, and has so operated since, except for interruptions in service over which the carrier had no control. It is to be noted that both the privilege and the exception created by these provisions relate to actual physical operations and causes and

that no question of intent is involved in the consideration of their applicability, except perhaps to the extent that intent or motive might enter into the question of the bona [fol. 91] fides of the operation. No "grandfather" right can be acquired by a holding out or other evidence of intent unless accompanied by actual operations, and conversely it is not necessary that interruptions of service should rise to the height of an intentional abandonment before they can be deemed to be lost. In our opinion the discontinuance of operation by applicant due to its insolvency and resulting involuntary bankruptcy is not the kind of interruption in service within the meaning of the exception. Prior to such bankruptcy it had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims. It is presumed to know that if it fails to conduct its business in such a way as to provide for obligations incurred by its operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the continuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of the motor carrier which lead to the bankruptcy. It is clear that all the "acts of bankruptcy" enumerated in the Bankruptcy Act as grounds for a petition in involuntary bankruptcy are so framed as to describe a voluntary action. And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent.

In the instant case, the Federal court receiver made no attempt to continue the motor-carrier operations of applicant. While he apparently did not have such authority under the order appointing him, the law is well settled that he could have requested a grant of such authority. He did not do so, however, and devoted his efforts to preserving and liquidating applicant's assets for the benefit of creditors. Consequently, so far as this record shows, there is no indication that he desired to continue applicant's former motor-carrier operations in whole or in part. Rather, it appears from his acts that he had no intention of continuing

motor-carrier operations so as to preserve any operating rights the bankrupt estate might have had under the act and that he intended to abandon all such operations.

As stated, the condition precedent to the issuance of a certificate or permit under the "grandfather" clauses of the act is operation on June 1 or July 1, 1935, as the case may be, and continuous operation since that time. In the instant case this condition has not been fulfilled, and since no operations have been carried on since October 30, 1937, [fol. 92] we have no authority under the "grandfather" clauses of the act to grant a certificate or permit to applicant.

With respect to applicant's request for a broker's license, it should be noted that any rights which it may have had to continue brokerage operations cannot be transferred or sold to another party, *Spencer Broker Application*, 8 M. C. C. 141; and we conclude that applicant, being bankrupt, properly could not be granted such a license.

The Northeastern Company was notified of the further hearing herein, but did not appear to protect its interest in the matter. From what has been said above, it follows that the alleged operating rights purchased by it from the bankrupt estate give it no authority to continue such former operations of applicant as may have been those of a motor carrier or a broker, and its failure to appear and assert any rights after due notice must be taken by us as a concession that it had no rights to assert.

We find that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the "grandfather" clauses of the act, and that its applications for such a certificate or permit should be denied.

We further find that the considered application for a broker's license should be denied.

An appropriate order will be entered.

LEE, *Commissioner*, dissenting:

I am unable to concur in this report. My reasons for not concurring in the denial of the broker's license sought in No. MC-51089 are sufficiently set forth in my dissenting expression in *Spencer Broker Application*, 8 M. C. C. 141, and their repetition here is unnecessary.

As to the applications in Nos. MC-51204 and MC-51088, wherein certificates or permits are sought, I am of the opinion that we do not have the necessary parties before us. The original applicant, Gregg Cartage & Storage Company, no longer has any interest in the applications and the rights claimed therein. Following the filing against it of an involuntary petition in bankruptcy, it was adjudicated a bankrupt on October 27, 1937, by the United States district court and, consequently, title to all of its assets, including its claimed "grandfather" operating rights here considered, passed to the bankruptcy court for the benefit of creditors. On December 6, 1937, the receiver in bankruptcy, acting under court order, sold these operating rights to Northeastern Transportation Company, hereinafter called Northeastern, and on January 7, 1938, and prior to the further hearing herein, the receiver in bankruptcy and Northeastern filed an application with us seeking substitution of Northeastern [fol. 93] as applicant in Nos. MC-51204 and MC-51088 in lieu of the bankrupt. We have not acted upon that application. It is clear from the above that Gregg Cartage & Storage Company no longer has any interest in these applications, and that the present claimant to the considered rights and the real party in interest is Northeastern. By reason of our failure to grant the application for substitution, Northeastern has been unable to take its proper place as applicant herein and to prosecute its claims. It has not had its "day in court," but despite this fact its claims are being determined.

I am also of the opinion that the considered interruption in the operations was an "interruption of service" over which applicant and its successor in interest, Northeastern, "had no control" within the meaning of the first proviso of section 206 (a) of the act. For convenience in discussion, this interruption in operations may be divided into the following three periods: (1) The period from October 5, 1937, to October 30, 1937, during which the State receiver was in charge of applicant's property; (2) the period from October 30, 1937, when the Federal receiver took charge, until December 6, 1937, on which date he sold the considered operating rights to Northeastern; and (3) the period since such sale.

Throughout the first period, which covered 25 days, the State receiver continued the operations on a limited scale. No new business was accepted, but shipments already on

hand were moved on to destinations and deliveries thereof effected. While operations during this period were largely reduced, there was not a complete cessation thereof.

During the second period, which covered 37 days, there was a complete cessation of operations. However, it is clear that the Federal receiver had no intention of abandoning the operating rights, since he promptly took steps to, and did, effect a sale thereof. Liquidation of the properties of bankrupts and equitable distribution of the proceeds among creditors is the ultimate purpose of bankruptcy proceedings, and operation of the properties pending sale, where possible and deemed advisable, is a mere incident in the liquidation process. Consequently, the fact that the receiver conducted no operations pending sale is no indication of an abandonment of the operating rights.

I am unable to subscribe to the view that temporary interruptions in service, occasioned by receivership or bankruptcy proceedings, should necessarily be construed to be interruptions in operations within the control of applicants within the meaning of section 206 (a). Persons sometimes find themselves in bankruptcy, or their properties in receivership, by reason of circumstances beyond their control. It is clear that such is the case here. There is no evidence of mismanagement or other dereliction on the part of [fol. 94] applicant. Interruptions in the operations of properties in bankruptcy or receivership are not uncommon and are often unavoidable. When receivers or trustees take charge of properties, a survey or inventory of the properties is often necessary before it can be determined whether operation of the properties is possible and, if so, whether such operation would best serve the interests of creditors and other interested parties. In some instances, the financial condition of estates is such as to make it impossible to operate the properties, and, in other instances, operations would result in losses and waste of the assets of the estates. If such interruptions in service are to be construed as putting an end to "grandfather" rights of carriers, whose applications therefor have not been determined, then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; it could not effect a composition or an arrangement with its creditors and resume operations; if a corporation, it could not be reorganized under the corporate reorganization pro-

visions of the Bankruptcy Act, and creditors could realize nothing from "grandfather" rights, however valuable. I cannot believe that Congress so intended.

Furthermore, a finding as to applicants, whose applications for "grandfather" certificates have not been determined, that such temporary interruptions of operations terminate their "grandfather" rights, would result in serious inequity to such applicants, since the same rule would not apply in the case of applicants, whose "grandfather" applications have been determined and who have received their certificates. Certificates issued by us may be terminated only for the causes, and in the manner, specified in section 212 (a) of the act as amended, which contains the following proviso:

Provided, however, That no such certificate * * * shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate * * * found by the Commission to have been violated by such holder:

In view of the use of the words "willfully fails" in the provision just quoted, our authority to revoke a certificate because of such temporary interruptions in operations during receiverships and bankruptcy proceedings is doubtful. However, assuming that we have the power, we may not exercise it, unless the holder of the certificate fails to comply within 30 days, or such longer period as we may fix, with an order entered by us, after hearing, in a proceeding under section 204 (d) and requiring resumption of operations.

[fol. 95] It is clear from section 212 (a) that Congress did not intend that such temporary interruptions in operations of holders of "grandfather" certificates should automatically terminate rights thereunder. Thousands of applications for "grandfather" certificates have been filed with us, and many of them are still undetermined by reason of our inability to reach all of them promptly. The fact that, by reason of this situation, we have granted a certifi-

cate to an applicant in one case and have been unable to act upon the application of an applicant in another case should not make any difference in the vulnerability of their "grandfather" rights to termination because of interruptions of the character here considered. Congress foresaw the impossibility of an immediate determination of all "grandfather" applications and, to care for this situation, provided in section 206 (a) that applicants for "grandfather" certificates might continue their operations until their applications had been determined. The right thus given to continue their operations is subject to no restriction, and I do not believe that Congress intended that "grandfather" rights during such period should be any more liable to termination because of these temporary interruptions in operations than are such rights after the issuance of a certificate.

There remains for discussion the third period of the interruption in operation, which extends from December 6, 1937, (the date of the sale by the Federal receiver of applicant's operating rights to Northeastern) to the present time. Under the act, no person may operate in interstate or foreign commerce as a common carrier by motor vehicle unless he (1) is the holder of a certificate of convenience and necessity from us, or (2) has on file with us an application therefor under the "grandfather" clause of section 206 (a) or under section 206 (b), or (3) is exempt from the certificate requirements of the act by reason of the second proviso of section 206 (a). Consequently, in order for Northeastern to operate lawfully as the successor in interest of applicant herein, it is necessary that Northeastern be substituted as the applicant in these proceedings. As indicated above, the Federal receiver and Northeastern promptly filed an application for such substitution, upon which no action has been taken. Northeastern has repeatedly urged that we dispose of that application. Under section 217 of the act, the filing with us of a tariff is also a prerequisite to lawful operation as a common carrier. Only persons included in one of the three groups just referred to are permitted by us to file tariffs. Consequently, unless and until Northeastern is substituted as applicant herein, it cannot file a tariff with us. It is apparent that the failure of Northeastern to conduct the considered operations since December 6, 1937, the date it purchased them, has been occasioned by our failure to permit it to be substi-
[fol. 96] tuted as applicant in place of Gregg Cartage & Storage Company. Northeastern should not be charged

with our failure to take prompt action on its petition for substitution.

The Motor Carrier Act authorizes the transfer of certificates and permits but makes no reference to transfer of rights of "grandfather" claimants prior to the issuance of certificates or permits as the case may be. Because of the practical necessity for allowing such claimants to dispose of their rights prior to formal adjudication by us, we have construed the act as authorizing such disposition and have followed the procedure of permitting a purchaser of the rights of a "grandfather" claimant to petition to be substituted in the place and stead of the original applicant. Where not more than 20 vehicles are involved, and the party seeking to purchase is not a carrier or controlled by, or affiliated with, another carrier, there is nothing to prevent the transfer either of a certificate, or of claimed rights under a "grandfather" application therefor. The granting of a petition for substitution merely permits the successor in interest to continue operations and to prosecute the application for a certificate. The successor in interest thereby acquires no right by reason of the substitution, not possessed by the applicant. He, the successor, merely steps into the shoes of the applicant, and is thereby enabled to continue the operation and to prosecute the application of the "grandfather" applicant. There is, therefore, for consideration, on a petition for substitution, logically and properly, only two questions, and they are (1) whether more than 20 vehicles are involved, and (2) whether petitioner is a carrier other than a motor carrier, or is controlled by, or affiliated with, certain carriers other than motor carriers. The last question is not before us because Northeastern, the petitioner here, is not a carrier, or controlled by, or affiliated with, any other carrier. As to the first question, it is not even suggested that more than 20 vehicles are involved. In this simple case, therefore, we have, by failing to act on the petition for substitution, caused a cessation of operations over a long period. By promptly approving the petition of the receiver in bankruptcy and Northeastern for substitution, all this delay would have been avoided, and the operations could have been resumed promptly. Now, and by this decision, valuable rights have been lost because of a cessation of operations extending over a period of approximately a year, all but five weeks of which was caused by us.

Therefore, I submit that neither the 5-week interruption while the properties were under control of the Federal court, nor the subsequent interruption, occasioned by our inaction on the petition for substitution, should be held to be an interruption in service over which applicant or its successor in interest had control.

[fol. 97] EXHIBIT "E" TO BILL OF COMPLAINT

M-4266

INTERSTATE COMMERCE COMMISSION

No. MC-51204[1]

Gregg Cartage & Storage Company Common Carrier Application

Submitted April 13, 1939. *Decided December* 12, 1939

1. Upon reargument, findings in prior report, 10 M. C. C. 255, affirmed.

2. Discontinuance of operations due to bankruptcy found to be an interruption of service over which applicant had control within the meaning of sections 206 (a) and 209 (a) of the Motor Carrier Act, 1935.

Howell Leuck and *Ferdinand Born* for applicant.
Henry P. Stacy for protestants.
Charles E. Cotterill, Edward S. Brashears, Clarence A. Kelly, and *Phillip S. Peyser* for interveners.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

These applications were denied by division 5 in the prior report herein, 10 M. C. C. 255. Upon petition by applicant they were reopened for reargument before us. The Ohio

[1] This report also embraces No. MC-51088, Gregg Cartage & Storage Company Common Carrier Application, and No. MC-51089, Gregg Cartage & Storage Company Broker Application.

Association of Commercial Haulers, J. C. Morris, of Fremont, Ohio, the American Trucking Associations, Inc., the Motor Carriers Tariff Bureau, the Akron Motor Transportation Association, and the Middle Atlantic States Motor Carriers' Conference, Inc., intervened. The case has been reargued.

The Gregg Cartage & Storage Company, an Ohio corporation, with principal office at Cleveland, Ohio, by applications seasonably filed seeks certificates of public convenience and necessity under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, authorizing it to continue operations in interstate or foreign commerce as a common carrier by motor vehicle, of general commodities, between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri, and the District of Columbia, over regular and irregular routes. Applicant seeks, if its operations are found to be those of a contract carrier, appropriate permits. In No. MC-51089 applicant seeks a license authorizing [fol. 98] operations as a broker for the purpose of arranging transportation of property by motor vehicle, in interstate or foreign commerce.

The findings of division 5, page 261 of the prior report, were as follows:

> We find that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the "grandfather" clauses of the act, and that its applications for such a certificate or permit should be denied.
>
> We further find that the considered application for a broker's license should be denied.

This proceeding presents the question whether the interruption in service due to bankruptcy was one over which applicant had no control within the meaning of the respective exceptions in sections 206 (a) and 209 (a) of the act. We shall not review herein the finding of division 5 with respect to the application for the broker's license. Neither shall we pass upon whether the interstate line-haul operations here involved, performed with vehicles owned by so-called owner-operators were motor-carrier operations of applicant or of the owner-operators.

The facts, as to which there is little if any disagreement, are recited in the report of division 5, pages 257-58, and need not be repeated.

After reciting certain additional facts relative to applicant's financial history and setting forth applicant's contention that except for the failure of the insurance company there would have been no involuntary bankruptcy with its resulting cessation of operation, division 5 stated, at pages 259-60:

In order for a motor carrier to receive a certificate or permit under the "grandfather" clauses of the act it must be established that such carrier or predecessor in interest was in bona fide operation as such on June 1, 1935, or July 1, 1935, and has so operated since, except for interruptions in service over which the carrier had no control. It is to be noted that both the privilege and the exception created by these provisions relate to actual physical operations and causes and that no question of intent is involved in the consideration of their applicability, except perhaps to the extent that intent or motive might enter into the question of the bona fides of the operation. No "grandfather" right can be acquired by a holding out or other evidence of intent unless accompanied by actual operations, and conversely it is not necessary that interruptions of service should rise to the height of an intentional abandonment before they can be deemed to be lost. In our opinion the discontinuance of operation by applicant due to its insolvency and resulting involuntary bankruptcy is not the kind of interruption in service within the meaning of the exception. Prior to such bankruptcy it had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims. It is presumed to know that if it fails to conduct its business in such a way as to provide for obligations incurred by its operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the con-[fol. 99] tinuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of the motor carrier which lead to the bankruptcy. It is clear that all the "acts of bankruptcy" enumerated in the Bankruptcy Act as grounds for a petition in involuntary bankruptcy are so framed as to described a voluntary

action. And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent.

We concur in the conclusion that voluntary and involuntary bankruptcy are within the control of the bankrupt and that he is responsible for the legal consequences that flow from the adjudication. Our attention has been called to no decision in support of this conclusion. It, however, follows by analogy and the application of the reasoning employed by the Supreme Court in the case of *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581. The Court said at pages 590-92:

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and dissolving the corporation, in *People* v. *Globe Ins. Co.*, 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the State, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. * * * In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. * * * we conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach

of an executory agreement, within the doctrine of *Rochm v. Horst, supra.*

We are satisfied with the conclusions reached by division 5 but desire to clarify them somewhat by making distinction in the effect of certain features of the administration of the estate of the bankrupt by the court.

In the instant case it appears that the State court receiver was appointed October 5, 1937, and the receiver in bankruptcy was appointed on October 30, 1937. The State court receiver performed some physical operations in this interval, but there is no evidence that the receiver in bankruptcy [fol. 100] ever performed or attempted to perform any operations whatever. Under the orders of the court he sold the operating rights, making the formal transfer on December 24, 1937, to Northeastern Transportation Company, which company, with the receiver, made application to us for approval of the transfer on January 7, 1938.

The attempted sale, of course, was ineffective without our approval and in no wise impaired the legal ability of the receiver to continue the operations until that approval was obtained. Hence the breach in the continuity of operations is to be ascribed to the bankruptcy for the period after as well as before the sale. Our holding in abeyance the application for approval had no significance or effect upon the crucial fact that no operations of any kind have been conducted from the time the receiver in bankruptcy took charge, and it is useless to speculate upon the question whether the "grandfather" right expired before or after the sale.

While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished.

One of the interveners at reargument argues that the interruption of service occurring after February 12, 1936, could have no effect on rights which had already been established under the "grandfather" clause of the act. In other words, it is his contention that the conditions precedent to the issuance of a certificate to a common carrier by motor vehicle under section 206 (a) of the act are (1) that it was in bona fide operation on June 1, 1935, (2) that

it has so operated since that time (up to the time of filing its application with us but not to extend beyond February 12, 1936), and (3) that it has filed its application with us on or prior to February 12, 1936. The date, February 12, 1936, is the last day on which applications could be filed under the requirement of section 206 (a) that applications for "grandfather" certificates should be made within 120 days after that section took effect, since we had by order under the authority of section 227 postponed the taking effect of section 206.

This same contention was considered by us in *Atlantic Motor Exp., Inc., Common Carrier Application*, 12 M. C. C. 576, 579-80. Our finding was against it. We have given further consideration to the question and are convinced that our former conclusion was correct, but we shall enlarge somewhat the statement of the reasons which lead us to it.

In the case mentioned, we said:

> East & West further contend that, even though we find that the interruption of service on February 20, 1936, was [fol. 101] within the predecessor's control, we are without authority to consider matters which occurred subsequently to the filing of the application in determining whether a certificate should be issued under the "grandfather" clause of section 206 (a) of the act. It is contended that this section of the act requires us to issue a certificate upon a showing of bona fide operation on June 1, 1935, and continuance of such operation to the date of the filing of the application. It is urged that an application filed with us is in the nature of a pleading and is of the same character as a petition or complaint filed with a court and that in such cases the court determines the rights of the petitioner or complainant as of the time his petition or complaint was filed.
>
> The problem centers around the meaning of the provision "since that time", which is contained in section 206 (a). "Since" is defined by the New Standard Dictionary as "from a past time, mentioned or referred to, up to the present". The "past time, mentioned or referred to" in section 206 (a) is June 1, 1935. Therefore, the matter to be determined in considering whether an applicant is entitled to "grandfather" rights as a common carrier, is whether the operation was bona fide on June 1, 1935, and whether it has been so conducted from that time "up to the present". This seems to be the correct interpretation of

the provisions of section 206 (a), and our decisions previously rendered have been based upon such an interpretation.

Omitting parts of the "grandfather" clause not now material, the language is as follows:

> if any carrier was * * * in bona fide operations * * * on June 1, 1935, * * * and has so operated since that time * * * the Commission shall issue such certificate.

The conditional clause is connected logically and grammatically with the conclusion and has the plain meaning that not until we have found that the conditions mentioned exist may we issue the certificate. The three elements are described as successive: (1) *bona fide* operation on the statutory date, (2) *bona fide* operation since that date, and (3) issue of the certificate. There is nothing in the language that impugns the almost obvious conclusion that the second element connects the first event in the succession with the last. On the contrary, the further language clearly indicates that an uninterrupted period between the statutory date and our decision was contemplated. The last sentence of the "grandfather" clause is: "Pending the determination of any such application the continuance of such operation shall be lawful." The antecedent of "such" can be nothing but the operations previously described, viz, bona fide operation on June 1, 1935, continued "since that time." Plainly, "pending the determination of the application" has reference to the same period as that described as "since that time."

It has been suggested, as an alternative to the contention of intervener, that the phrase "since that time" should be construed as describing a period beginning with the statutory date and ending with the date on which the act became effective. This contention is based upon the well-recognized [fol. 102] principle that, unless the contrary intention appears therein, a statute will be presumed to speak as of the date of its taking effect. A contrary intent, however, does appear in the Motor Carrier Act. It contemplates that the different sections may take effect at different times, depending upon the exercise by us of the power conferred upon us by section 227 to postpone the taking effect of any section of the act except section 227 itself. We did exercise these powers, and some sections became effective before others, so that no one day can be said to be the definite

day upon which the Congress could have been deemed to have spoken.

Either of the constructions discussed would lead to a result which is not only absurd in itself but has also been negatived in several decisions of the Supreme Court. If it should be considered that the period "since that time" ends at any day short of our action upon the application and that, consequently, upon that day the conditions of the "grandfather" clause were fulfilled and the right itself then deemed complete and vested, it would necessarily follow that the requirement that the operations be conducted in good faith would also have been fulfilled and be no longer obligatory. If that construction obtained, a carrier could conduct his operations in good faith from June 1, 1935, up to the taking effect of the act or to the subsequent filing of his application but thereafter in manifest bad faith and there would be no statutory authority for us to deny him a certificate. Such a result could not have been intended, and, at least in cases where the bad faith consists of operations in open defiance of State laws, it is clearly at variance with the principles announced in *McDonald* v. *Thompson*, 305 U. S. 263. The underlying principle that our actual action rather than the grant of the statutory power to take the action is the determinative factor in proceedings under the Motor Carrier Act is clearly announced by the Supreme Court in *Welch* v. *New Hampshire*, 306 U. S. 79, and *Eichholz* v. *Missouri Public Service Comm.*, 306 U. S. 268.

We are not oblivious to the practical consequences of the construction which we are constrained to adopt. Because of the sheer magnitude of the task, we have been unable to pass upon all of the nearly 90,000 "grandfather" applications filed with us. Some carriers are still operating under the privilege contained in the "grandfather" clause, while others have received our authority to operate. The consequences of interruptions of service differ in the two classes, since the revocation of an actually issued certificate must be accomplished under the procedure provided in section 212 (a) of the act, and an interruption of service does not of itself necessarily result in the destruction of operating rights. Thus, it may happen that an interruption of service results in the denial of operating rights to a carrier whose application, through no fault of his own, has not [fol. 103] been passed upon, while an interruption of precisely the same character would not have this effect in the

case of another carrier whose application had, by chance, been reached and decided first.

The possibility of injustice and inequality in this situation will pass away with our anticipated disposition of all "grandfather" applications. Few actual cases of unjust consequences have come to our attention. In any event the result is one which we could not avoid except by adopting a construction of the act which not only is unwarranted in law but which, as pointed out above, would have the more evil consequence of requiring us to grant authority to carriers whose operations after the filing of the application are characterized by bad faith and law breaking.

We affirm the findings and conclusions of division 5 and find that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the "grandfather" clauses of the act, and that its applications for such certificate or permit should be denied.

LEE, *Commissioner*, dissenting:

For the reasons stated in my dissent to the prior report, 10 M. C. C. 255, I am unable to concur in the finding that the interruptions in operations here considered were interruptions of service within applicant's control within the meaning of the "grandfather" clauses of sections 206 (a) and 209 (a) of the act.

Furthermore, assuming that the interruptions were within applicant's control, they occurred long after sections 206 (a) and 209 (a) became effective and, in my opinion, do not affect "grandfather" rights. I cannot subscribe to the majority's interpretation of the "grandfather" clauses as meaning that, in order for a carrier to be entitled to operating authority thereunder, it must have been in continuous operation from June 1, 1935, as to a certificate, or from July 1, 1935, as to a permit, *until the date of the determination of its application*, except for interruptions beyond its control. As admitted by the majority, this interpretation will result in substantial inequity among applicants as to the effect of interruptions in operations upon their "grandfather" rights. Thousands of "grandfather" applications have been filed with us, many of which are still undetermined by reason of our inability to reach all of them promptly, and it is not possible at this time to predict with any degree of certainty when all will have been determined. The

fact that, by reason of this situation, we have granted authority to an applicant in one case and have been unable [fol. 104] to act upon the application of another applicant should not make any difference in the effect of interruptions in operations upon their "grandfather" rights, and I cannot believe that Congress so intended. Because of this situation, the majority's interpretation also results in unequal treatment in that applicants whose applications were determined early were required to prove operation over periods of only a few months, while those whose applications we reach toward the end will have to show operation over periods of several years.

An interpretation which results in such inequities should be indulged only where unavoidable, which is not the case here. As stated by the majority, it is a well-recognized principle of statutory construction that a statute will be presumed to speak as of the date of its taking effect, unless a contrary intention appears therein, but it is concluded that the fact that the act contemplates that some of its sections may become effective on different dates evidences a contrary intention. I do not think so. There is nothing illogical in interpreting the act as speaking, as to its several sections, as of the respective dates such sections became effective, and such an interpretation would result in no confusion. So interpreted, the words "was in bona fide operation * * * on June 1, 1935, * * * and has so operated since that date", in the "grandfather" clause of section 206 (a), would mean operation from June 1, 1935, to October 15 of that year. Under such interpretation all "grandfather" applicants would receive equal treatment. In order to secure a certificate, each would have to show operations over the same period, and there would be no disparity as to termination of operating rights by reason of interruptions in operations.

COMMISSIONERS PORTER and CASKIE concur in this dissenting expression.

ALLDREDGE, *Commissioner*, dissenting:

The effect of the conclusions reached by the majority will be to wipe out the operating rights of a large number of motor carriers who have had the misfortune to become bankrupt during the long period since June 1, 1935.

As a matter of fact, there will probably be very few, if any, operations of insolvent motor carriers actually con-

ducted by court receivers pending the final reorganization of the bankrupt carriers or sale of their assets. In the usual case, the receiver will be unable to obtain the necessary capital to continue operations. As a result, where the "grandfather" rights of the carrier have not already been determined, they will vanish, as the interruptions in each case must be found to be within the carrier's control. [fol. 105] The finding of the majority that such interruptions are within the carriers' control is effected through employment of a legal fiction, based upon the rule expressed by division 5 as follows:

> And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent.

I doubt the wisdom of our adopting this legalistic rule for application in cases of this kind. It seems to me that we should look behind the cold facts of bankruptcy in order to learn the true facts surrounding an interruption of a carrier's operations by operation of the bankruptcy laws. Where, as appears in this case, the receivers have acted with diligence to preserve the bankrupt's estate, the bankrupt carrier could not in fact have reasonably avoided its misfortunes, and we have failed to cooperate with one of the receivers and a company which was ready and anxious to take over and operate the business by refusing to consider and permit the transfer of whatever rights existed at the time of sale, I cannot subscribe to a decision which wipes out all operating rights in existence at the time bankruptcy occurred.

In my opinion, the real cause of the trouble in which this carrier now finds itself was our failure immediately to consider and authorize the transfer of whatever rights it had at the time of the sale to the Northeastern Transportation Company. Without such authorization, the purchaser could not, of course, file tariffs as required by the Motor Carrier Act and could not furnish the necessary capital and recommence the operation. Had it been able to do so shortly after December 1, 1937, I feel that the majority would not now find that the "grandfather" rights were destroyed because

of the slight delay brought about by the incidents of bankruptcy.

COMMISSIONER SPLAWN concurs in this dissenting expression.

[fol. 106] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed July 23, 1940

The Interstate Commerce Commission, one of the defendants in the above-entitled action, and hereinafter referred to as the Commission, for answer unto so much or such parts of plaintiffs' bill of complaint as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs 1 to 3, inclusive, of the bill of complaint, the Commission, for the purposes of this action, admits that the allegations therein contained are true.

II

Answering paragraph 4 of the bill of complaint, the Commission respectfully refers the Court to the decision of Division 5, Exhibit D to the bill of complaint, and to the decision of the entire Commission, Exhibit E to the bill of complaint, for a more full and complete statement of the facts than is contained in said paragraph 4. To the extent that any allegations of fact in said paragraph 4 are not consistent with statements of fact contained in Exhibits D and E to the bill of complaint, the Commission denies such allegations.

[fol. 107] The Commission denies the allegations contained in the last sentence of paragraph 4 wherein plaintiffs allege that they were at all times herein mentioned entitled as a matter of right and law under the Motor Carrier Act to have issued to them a certificate of public convenience and necessity.

The Commission admits that a true copy of the proposed report of Examiner Maidens is attached to and made a part of the bill of complaint as Exhibit A.

III

Answering paragraph 5 of the bill of complaint, the Commission admits that the application therein referred to was filed with it on February 12, 1936.

IV

Answering paragraph 6 of the bill of complaint, the Commission admits that a hearing on the plaintiffs' application was conducted before Examiner Maidens, and that on December 17, 1937, said Examiner recommended the entry of a report and order containing the finding referred to in paragraph 6. For a more full and complete statement of the Examiner's conclusions, the Commission refers the Court to Exhibit A to the bill of complaint.

Further answering paragraph 6, the Commission admits that on April 8, 1938, it assigned for further hearing the application of plaintiffs, which further hearing was conducted before Examiner Borroughs at Cleveland, Ohio, on May 4, 1938. In connection with the allegation of paragraph 6 that the Commission's order of reference did not designate for what purpose the said application was referred for additional hearing, the Commission alleges that by its order of February 11, 1938, in this proceeding it specifically ordered that said proceeding be and it was "reopened for further hearing at a time and place to be fixed by the Commission, solely in respect to discontinuance of the operations for which authority is sought in the said application."

Further answering paragraph 6, the Commission admits that at the hearing therein referred to, Examiner Borroughs made statements set out in said paragraph, and that on June 29, 1938, he issued a suggested report and [fol. 108] order, attached to and made a part of the bill of complaint as Exhibit C, containing the finding referred to in said paragraph 6, to which suggested report and order the Commission respectfully refers the Court for more full and complete information in the premises.

Further answering paragraph 6, the Commission has not been furnished a copy of the evidence, referred to and made a part of the bill of complaint as Exhibit B, and consequently is unable to admit or deny whether said exhibit contains all of the evidence upon which the Commission acted and decided this case.

Further answering the allegations of paragraph 6, the Commission admits the other allegations therein contained, including the issuance by Division 5 of the report and order referred to and made a part of the bill of complaint as Exhibit D, and the report of the entire Commission upon reargument, referred to and made a part thereof as Exhibit E, to which reports and order the Commission respectfully refers the Court for more full and complete information in the premises.

V

Answering paragraph 7 of the bill of complaint, the Commission alleges that, in and as shown by said reports, it was unnecessary for it to determine, as alleged in paragraph 7, that plaintiffs were in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and prior thereto. The Commission denies that plaintiffs were entitled to a certificate of public convenience and necessity, as alleged in said paragraph, under Section 206(a) of the Motor Carrier Act.

Further answering said paragraph, the Commission denies that the evidence introduced at the hearings before it was not sufficient to show that the interruption of service referred to therein was a matter over which plaintiffs had control within the meaning of Sections 206(a) and 209(a) of the Motor Carrier Act. The Commission denies that in making and entering its said order it exceeded its statutory power and acted arbitrarily and unreasonably, and further denies that said order is based upon improper distinctions and considerations and interpretations of the Motor Carrier Act of 1935.

[fol. 109] Further answering said paragraph 7, the Commission denies that plaintiffs have been denied due process of law or that they will suffer irreparable injury. The Commission further denies that it acted arbitrarily and unreasonably and without evidence to support its conclusion; denies that the interruption of service resulting from plain-

tiffs' bankruptcy was not within plaintiffs' control, and denies further that in finding that the continued nonoperation by plaintiffs was within their control, it acted either arbitrarily or unreasonably. The Commission denies the allegation that said nonoperation was due to the failure of the Commission to approve the sale and transfer of whatever rights plaintiffs had.

Further answering said paragraph 7, the Commission alleges that it took into consideration the character of the operation and circumstances under which the interruption of service occurred, and denies the allegations to the contrary contained in said paragraph. The Commission further denies that its action was either arbitrary or unreasonable or that it exceeded its statutory powers in any respect.

VI

The Commission further alleges that said reports and order, made parts of the bill of complaint as Exhibits D and E, were made and issued in proceedings No. MC-51204, No. MC-51088 and No. MC-51089, instituted pursuant to application filed with the Commission for the purpose of determining whether the Gregg Cartage & Storage Company was entitled to either a certificate under Section 206(a) or a permit under Section 209(a) of the Motor Carrier Act of 1935, and to a broker's license under Section 211 of that Act; that in said proceedings the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearings provided for in and by said Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in and by said exhibits was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the plaintiffs herein, by the counsel of said plaintiffs; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said [fol. 110] matters were fully argued and submitted to the Commission for determination on behalf of said plaintiffs by their respective counsel, including questions raised by plaintiffs in this action, whereupon the Commission determined said matters and entered and duly served upon the plaintiffs herein, and upon other interested parties, its said reports and order; that said reports and order included the

Commission's findings of fact, decisions, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the plaintiffs in said proceedings by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

VII

The Commission further alleges that said order of November 14, 1938, was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each and all the allegations contained in the bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and order of November 14, 1938, and December 12, 1939, which reports and order are hereby referred to and made a part hereof. [fols. 111-112] All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission. By E. M. Reidy.
Daniel W. Knowlton, Chief Counsel.

Duly sworn to by Joseph B. Eastman. Jurat omitted in printing.

[fol. 113] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed July 26, 1940

Answering the complaint filed against it in the above entitled cause, United States of America, defendant, says:

1. The allegations of Paragraph I of the complaint are admitted.

2. The allegations of Paragraph II of the complaint are admitted.

3. The allegations of Paragraph III of the complaint are admitted.

4. The allegations of Paragraph IV of the complaint are admitted except that United States denies the allegation therein that "operations were carried on continuously between Buffalo and other points since 1932"; and denies the further allegation that the petitioner "was at all times herein mentioned entitled as a matter of right and law under the provisions of Section 206a of the Motor Carriers Act of 1935 (Title 49 U. S. C. A. Section 306a) known as the 'Grandfather's Clause' thereof, to have issued to it by the defendant Commerce Commission a certificate of public convenience and necessity authorizing such operation".

5. The allegations of Paragraph V of the complaint are admitted.

6. The allegations of Paragraph VI of the complaint are admitted except that United States denies the allegation therein that "said order of reference did not designate for [fol. 114] what purpose the said application was referred for additional hearing"; and denies further that the reports of the Interstate Commerce Commission's examiners, therein mentioned, constitute the official action and decision of the Commission, or that they have any relevant legal significance in connection with this suit.

7. The allegation of Paragraph VII of the complaint are denied.

8. United States denies that this Court has power or jurisdiction to grant the relief prayed in Paragraph IV of the prayer of the complaint which seeks an order of this Court "commanding said Interstate Commerce Commission to issue a certificate of public convenience and necessity to this petitioner, the Gregg Cartage & Storage Company".

Wherefore, United States prays that the complaint be dismissed at the costs of the complainants and for such other and further relief as may be proper.

Frank Coleman, Special Assistant to the Attorney General, Thurman Arnold, Assistant Attorney General; Emerich B. Freed, United States Attorney.

Copy mailed by Sp. Asst. to the Atty. Gen., to Howell Leuck on 7/22/40.

E. B. Freed, U. S. Attorney.

[fol. 115] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

No. 20369

GREGG CARTAGE & STORAGE COMPANY, Cleveland, Ohio,

HUGH WELLS, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, Leader Building, Cleveland, Ohio, *Plaintiffs*,

NORTHEASTERN TRANSPORTATION COMPANY, Cleveland, Ohio, *Intervener*,

vs.

UNITED STATES OF AMERICA,

INTERSTATE COMMERCE COMMISSION, Washington, D. C., *Defendants*

MOTION TO INTERVENE AS PLAINTIFF—Filed August 30, 1940

Now comes the Northeastern Transportation Company and through its counsel moves for leave to intervene as a plaintiff in this action in order to assert the rights set forth in its proposed intervening bill of complaint, a copy of which is hereto attached, under the provisions of Title 28 U. S.

C. A., Section 45-A of the Judicial Court and judiciary and on the ground that the decision of the Interstate Commerce Commission in the matter of the Gregg Cartage & Storage Company, proceedings Nos. MC-51204, MC-51088 and MC-51089, is of great interest to this intervener as affecting its application for substitution, proceedings No. MC-FC-3082, now pending before the Interstate Commerce Commission and that it purchased from the duly authorized and acting receiver in bankruptcy of the Gregg Cartage & Storage Company the Grandfather Rights of that company, which purchase was confirmed by the District Court of the United States for the Northern District of Ohio, Eastern Division, and as such has rights and claims which are common to the main action.

Howell Leuck & Bingham W. Zellmer, Attorneys for Intervener, 840 Leader Building, Cleveland, Ohio, Cherry 5344.

[fol. 116] *Notice*

Defendants will please take notice that the Northeastern Transportation Company has filed its motion to intervene as plaintiff in the captioned matter and that the same will be on for hearing at such time as may suit the convenience of the Court.

Howell Leuck & Bingham W. Zellmer, Attorneys for Intervener.

Acknowledgement

Copy of the foregoing motion received this 30th day of August, 1940.

Howell Leuck & Bingham W. Zellmer, Attorneys for Gregg Cartage & Storage Company and Hugh Wells, Trustee in Bankruptcy of Gregg Cartage & Storage Company.

Copy of the foregoing motion received this 30th day of August, 1940.

E. B. Freed, by I. T., United States District Attorney.

Copy of the foregoing motion received this — day of August, 1940.

——, Attorney for Interstate Commerce Commission.

Copy mailed 8/30/40. Bingham W. Zellmer.

[fol. 117] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING MOTION OF NORTHEASTERN TRANSPORTATION CO. TO INTERVENE—Filed September 20, 1940

The motion of the Northeastern Transportation Co., of Cleveland, Ohio was filed in the District Court of the United States for the Northern District of Ohio Eastern Division on the 30th day of August and came on for hearing on the 7th day of September, 1940. All parties interested having been served with notice the court finds that the intervening petitioner is entitled to intervene in the above entitled action under the provisions of title 28 U. S. C. A., Section 45-A of the Judicial Court and Judiciary and on the ground that the decision of the Interstate Commerce Commission in the matter of the Gregg Cartage & Storage Company, proceedings Nos. MC-51204, MC-51088 and MC-51089, is of great interest to this intervener as affecting its application for substitution, proceedings No. MC-FC-3082, now pending before the Interstate Commerce Commission and that it purchased from the duly authorized and acting receiver in bankruptcy of the Gregg Cartage & Storage Company the Grandfather rights of that company, which purchase was confirmed by the District Court of the United States for the Northern District of Ohio, Eastern Division, and as such has rights and claims which are common to the main action.

It is therefore ordered that the Northeastern Transportation Company may intervene as a party plaintiff in the above entitled proceedings.

R. N. Wilkin, Judge.

Notice by clerk hereby waived. Bingham W. Zellmer.

[fol. 118] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

INTERVENER'S BILL OF COMPLAINT—Filed September 20, 1940

1. Now comes the Northeastern Transportation Company of Cleveland, Ohio, intervening petitioner herein, and

respectfully represents that it has an interest in the matter in controversy in the above entitled proceedings and desires to intervene and become a party to said proceedings.

2. Jurisdiction of this court is invoked under the provisions of Title 28 U. S. C. A., Section 45-A of the Judicial Court and judiciary.

3. For its grounds of the proposed intervention, your intervener, the Northeastern Transportation Company, says that it is a corporation duly organized under and by virtue of the laws of the State of Ohio, with its principal place of business in the City of Cleveland, State of Ohio, and that the decision of the Interstate Commerce Commission in the matter of the Gregg Cartage & Storage Company proceedings No. MC-51204 and No. MC-51088 and No. MC-51089, are of great interest to this intervener as affecting its application for substitution proceedings No. MC-FC-3082 now pending before the Interstate Commerce Commission on an application for reargument and reconsideration and for that reason desires an opportunity to participate herein in support of the plaintiff's bill of complaint.

4. This intervener further says that for its intervening [fol. 119] bill of complaint and for its cause of action it adopts and incorporates all the allegations contained in the original bill of complaint filed on behalf of the Gregg Cartage & Storage Company and Hugh Wells, trustee in bankruptcy of the Gregg Cartage & Storage Company, as though fully re-written herein and made a part hereof.

5. Your intervener says that on the 13th day of November, 1937, Joseph G. Ehrlich, the duly authorized and acting receiver in bankruptcy of the Gregg Cartage & Storage Company, filed an application in the Federal Court to sell the Grandfather rights of the Gregg Cartage & Storage Company and that on the 6th day of December, 1937, the sale of these rights to the Northeastern Transportation Company was confirmed by the District Court of the United States for the Northern District of Ohio, Eastern Division. Immediately thereafter, an application was filed with the Interstate Commerce Commission for appropriate authority to substitute the Northeastern Transportation Company as applicant in proceedings Nos. MC-51088 and MC-51204 in lieu of the Gregg Cartage & Storage Company in

order that it might commence operations immediately and not jeopardize the rights it had purchased from the receiver in bankruptcy. This intervener further says that it repeatedly requested the Interstate Commerce Commission to act upon the application for substitution in order that it might file tariff rates and operate in Interstate commerce and that this application was held in abeyance by the Interstate Commerce Commission and not acted upon at the time the original bill of complaint was filed in the District Court of the United States by the Gregg Cartage & Storage Company. This intervener further says that what operations were started, preparatory to commencing business, were suspended at the urgent request of Roy M. Snetzer, District Director of Division 5 of the Interstate Commerce Commission, and his assistant, William Hubbard.

Wherefore, intervener prays:

1. Writ of Subpoena ad Respondendum issue immediately out of, and under seal of this Court, and be directed to said defendants, United States of America and Interstate Commerce Commission, requiring and commanding said defendants on day certain therein to be specified to be and appear before this Court and to answer this Intervening Bill;

[fols. 120-121] 2. That this Court direct that due and proper notice of this Bill and proceedings issue, and be served forthwith, as prescribed in Act of October 22, 1913, C-32; 28 U.S. C. A.; Section 41 (8), 41 (28), 43, 44, 45, 45a, 46, 47a and 48 of said act;

3. That this court enter its order setting aside and annulling the order of the Interstate Commerce Commission in the matter of the Gregg Cartage & Storage Company proceedings Nos. MC-51204, MC-51088 and MC-51089 and each and every part thereof and forever enjoin any construction thereunder;

4. That this court upon final hearing issue an order upon the defendant, Interstate Commerce Commission, commanding said Interstate Commerce Commission to issue a certificate of public convenience and necessity to the petitioner, the Gregg Cartage & Storage Company;

5. That this court upon final hearing issue an order upon the defendant, Interstate Commerce Commission, command-

ing said Interstate Commerce Commission to grant the application of this intervener, Northeastern Transportation Company, for substitution and issue a certificate of public convenience and necessity to this intervener;

6. That this intervener have and recover of said defendant its proper costs of suit;

7. That this intervener have such other, further and general relief as may be equitable and proper.

Respectfully submitted, Howell Leuck & Bingham W. Zellmer, Attorneys for Intervener, 840 Leader Building, Cleveland, Ohio, Cherry 5344.

Service upon the plaintiffs, Gregg Cartage & Storage Company and Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, is hereby waived.

Bingham W. Zellmer, Attorney for Gregg Cartage & Storage Company and Hugh Wells, Trustee in Bankruptcy of Gregg Cartage & Storage Company.

Duly sworn to by Bingham W. Zellmer. Jurat omitted in printing.

[fol. 122] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA TO INTERVENER'S BILL OF COMPLAINT—Filed November 5, 1940

The defendant, the United States of America:

1. Admits the allegations of paragraphs 1, 2 and 3 of the intervener's bill of complaint.

2. For answer to paragraph 4 adopts and incorporates herein the answer of the United States to the bill of complaint filed herein by Gregg Cartage & Storage Company, et al.

3. Admits the allegation contained in the first sentence of paragraph 5 and the allegation of said paragraph that the Interstate Commerce Commission had not acted upon inter-

vener's application for substitution in MC-51088 and MC-51204 at the time the original bill of complaint herein was filed; and denies all remaining allegation of said paragraph.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Thurman Arnold, Assistant Attorney General.

[fol. 123] Frank Coleman, Special Assistant to the Attorney General.

Emerich B. Freed, United States Attorney.

A copy of the foregoing Answer of the United States to Intervener's Bill of Complaint was this day mailed to the following persons:

Howell Leuck, Esq. and Bingham W. Zellmer, Esq., 840 Leader Building, Cleveland, Ohio, Counsel for Plaintiffs and Intervener, Northeastern Transportation Co.

E. M. Reidy, Esq., Washington, D. C., Counsel for Defendant Interstate Commerce Commission.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

October 31, 1940.

[fol. 124] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO INTERVENER'S BILL OF COMPLAINT—Filed October 18, 1940

The Interstate Commerce Commission, defendant in the above-entitled case, for answer to the bill of complaint filed in this Court by the Northeastern Transportation Company, answers and says:

I

Answering paragraph 1 of the intervener's bill of complaint, the Commission admits an interest on the part of the Northeastern Transportation Company in this case.

II

Answering paragraph 2 of the intervener's bill of complaint, the Commission admits this Court has jurisdiction under U. S. Code, Title 28, Sec. 45a.

[fol. 125]

III

Answering paragraph 3 of the intervener's bill of complaint, the Commission admits the organization and incorporation of the Northeastern Transportation Company, as therein alleged, and the interest of this intervener because of its application for substitution in No. MC-FC 3082, referred to in said paragraph.

IV

Answering paragraph 4 of intervener's bill of complaint, the Commission adopts and incorporates herein its answer filed in this Court on July 23, 1940, to the original bill of complaint of Gregg Cartage & Storage Company et al., for answer to the allegations of this paragraph.

V

Answering the allegations of paragraph 5 of intervener's bill of complaint, the Commission admits that on November 13, 1937, the referee in bankruptcy in No. 45026 then pending in the District Court of the United States, Northern District of Ohio, Eastern Division, granted the receiver's petition for leave to sell the assets of the bankrupt, including any rights it might have to certificates of public convenience and necessity from this Commission, and that on December 6, 1937, the referee in bankruptcy confirmed the sale of these assets to the Northeastern Transportation Company, intervening complainant herein, for the sum of Eight Hundred and Fifty Dollars ($850).

Answering further the allegations of this paragraph, the Commission alleges that it was not until January 7, 1938, that an application was filed with it by the receiver of the Gregg Cartage & Storage Company for authority to substitute the Northeastern Transportation Company as applicants in proceedings Nos. MC 51088 and MC 51204.

[fol. 126] The Commission further alleges it entered an order under date of June 13, 1940, in No. MC-FC 3082, in

response to said application for substitution, the body of which reads:

"*It appearing*, That the above-named applicants made application for appropriate authority to substitute Northeastern Transportation Company, a corporation, as applicant in Nos. MC 51088 and MC 51204 in lieu of Gregg Cartage & Storage Company, a corporation, Joseph G. Ehrlich, Receiver;

"*It further appearing*, That Nos. MC 51088 and 51204 were denied by order entered December 12, 1939, and seller does not now possess interstate motor carrier operating rights which may be transferred; therefore,

"*It is ordered*, That application No. MC-FC 3082 be, and it is hereby, dismissed.

"By the Commission, division 5."

Answering further the allegations of this paragraph, the Commission denies that the operations therein referred to were suspended at the request of the officials of the Commission therein referred to, or at the request or direction of any such official; that on the contrary the field representatives of the Commission had and have no authority to issue such instructions to motor carriers.

VI

Further answering the intervener's bill of complaint, the Commission alleges that its reports and order here under review, made parts of the original bill of complaint as Exhibits D and E, were made and issued in proceedings Nos. MC-51204, MC-51088 and MC-51089, instituted pursuant to application filed with the Commission for the purpose of determining whether the Gregg Cartage & Storage Company was entitled to either a certificate under Section 206(a) or a permit under Section 209(a) of the Motor Carrier Act of 1935, and to a broker's license under Section 211 of that Act; that in said proceedings the parties thereto, were, and that each of them was, accorded the full hearings provided for in and by said Act; that in said hearings a large volume of testimony and other evidence bearing upon [fol. 127] the matters covered in and by said exhibits was submitted to the Commission for consideration; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were

fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and duly served upon the interested parties, its said reports and order; that said reports and order included the Commission's findings of fact, decisions, conclusions, order and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties in said proceedings by their respective counsel.

The Commission further alleges that following the issuance by it of its order of denial of authority to substitute, as set forth in the body of the order incorporated in paragraph 5 of this answer, the intervening complainant, on August 29, 1940, filed a petition for rehearing of such action and reargument thereon, which petition has as yet been unacted upon by the Commission.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in [fols. 128-129] the intervener's bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in the reports and order of November 14, 1938, and December 12, 1939, referred to in the Commission's answer to the original complaint.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said intervening bill of complaint be dismissed.

Interstate Commerce Commission, by E. M. Reidy,
Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Joseph B. Eastman. Jurat omitted in printing.

[fol. 130] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—Jan. 4, 1941

It appearing that the Plaintiff filed a bill of complaint on June 7, 1940 in the above entitled proceedings seeking to set aside and annul an order of the Interstate Commerce Commission, and each and every part thereof, and forever enjoin any construction thereunder, and seeking an order of this Court commanding the Interstate Commerce Commission to issue a certificate of public convenience and necessity to the petitioner, The Gregg Cartage & Storage Company, in a certain proceedings referred to as Interstate Commerce Commission Docket No. MC-51204, MC-51088, MC-51089, and this Court, having found that the issues joined must be presented to a statutory Court consisting of three Judges, one of whom shall be a Circuit Judge,

It Is Therefore Ordered that the issues in this case be and they hereby are set for hearing on Wednesday, January 29, 1941 at ten o'clock A. M., in the Federal Court Building in the city of Cleveland, Ohio and the Honorable Florence E. Allen, United States Circuit Judge, Sixth Circuit, and the Honorable Robert N. Wilkin, United States District Judge for the Northern District of Ohio, or such other Judge or Judges as circumstances may require to be substituted for either or both of these Judges, are called to the assistance of the Judge of this Court to hear and determine the said application.

Paul Jones, U. S. District Judge.

January 4th, 1941.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING TO COURT ON PLEADINGS AND EVIDENCE BEGUN AND CONCLUDED; CAUSE TAKEN UNDER ADVISEMENT BY THE COURT

(Entered January 29, 1941 by Allen, C. J., Jones, D. J., Wilkin, D. J.)

This day came the parties by their attorneys, and this cause came on for trial by the Court on the pleadings and

the evidence. And the Court having received the evidence adduced by the parties and having heard the arguments of counsel for the parties and, being advised in the matter, took this cause under advisement.

[fol. 132] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action. No. 20369

GREGG CARTAGE & STORAGE COMPANY, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants

NORTHEASTERN TRANSPORTATION COMPANY, Intervener

OPINION—Filed Feb. 20, 1941

Before Allen, Circuit Judge, Jones and Wilkin, District Judges.

Per Curiam:

This action was brought under Sec. 41(28), 43-48, Title 28 U. S. C., to set aside, annul or suspend an order of the Interstate Commerce Commission which denied the plaintiff's application for certificate of convenience and necessity, as provided for in Sec. 306(a) Title 49 U. S. C.

The Intervener, Northeastern Transportation Company, claims to have succeeded to the rights and interests of the plaintiff by virtue of sale and assignment from the receiver of the bankrupt estate of the plaintiff. (Sec. 45a, Title 28 U. S. C.)

There is no dispute as to the essential facts. The question presented is whether the ruling upon the facts by the Commission is justified in law.

The undisputed evidence shows that the plaintiff was in operation on June 1, 1935 and was therefore entitled to the rights specified in Sec. 306(a) Title 49 U. S. C., known as "grandfather" rights. On February 12, 1936, the plain-

tiff filed an application for certificate of authorization. Plaintiff was at that time insured against public liability by the Central Mutual Insurance Company, and in January, 1937, such insurance company was adjudged a bankrupt and ceased payment of all claims, leaving the plaintiff with about $200,000 of liabilities. Being unable to discharge such obligations, the plaintiff asked for the appointment of a receiver in the common pleas court of Cuyahoga County, Ohio, on October 4, 1937. At the same time creditors filed a petition in bankruptcy, and the plaintiff was adjudged bankrupt by this court (West, J.). On October [fol. 133] 14, 1937, plaintiff made application to the Interstate Commerce Commission for permission to suspend operations without prejudice to its "grandfather" rights. Such permission was denied for want of authority by the Commission. On October 30, 1937, a receiver was appointed for the bankrupt estate, and, on December 6, 1937, the good will and assets of the plaintiff, including its rights under pending applications with the Commission, were sold by the receiver at public auction to the Intervener for $850.

The state court receiver, between October 5 and October 30, confined his operations to deliveries of shipments then *en route*. No new business was accepted. The federal court receiver sought no authority to continue operations and confined his efforts to liquidating the business. After sale, the federal court receiver and the Intervenor filed a joint request that the Intervenor be substituted as applicant for plaintiff's "grandfather" rights. Action on the application for substitution was held in abeyance by the Commission pending determination of plaintiff's original application. Pending determination of such applications, no operations were engaged in by the Intervenor, although it had asked permission to file tariffs and resume service.

The original application was referred to an Examiner, who, on December 17, 1937, recommended allowance of the application. The matter was referred again to an Examiner for further hearing on the question of "Discontinuance of operation." Hearing was had on May 4, 1938, and on June 29 the Examiner recommended that applicant be granted a certificate because the interruption in service was one beyond applicant's control. In November, 1938, the application and the Examiner's report were reviewed by Division 5 of the Commission and the application was denied. On December 12, 1939, after review by

the full Commission, the decision of Division 5 was sustained, upon the ground that the interruption of service following bankruptcy was fatal to applicant's rights.

Section 306(a) provides that a carrier in operation on June 1, 1935, shall be granted a certificate provided it has operated *bona fide* since that time. But it excepts from the requirement as to operation "interruption of service over which the applicant or its predecessor in interest had no control." The plaintiff and the intervenor contend that the evidence reveals a state of facts "over which the appli- [fol. 134] cant or its predecessor in interest had no control." It is their view that the interruption of service was due entirely to the failure of the insurance company, which created a condition clearly beyond their control.

The Commission, however, declined to look beyond the bankruptcy. It held bankruptcy to be a matter within the control of the applicant without considering the causes of bankruptcy. Such a ruling by the Commission is the adoption of a proper administrative policy or the application of a rule of law, and in either case it seems to be a proper exercise of its authority and not subject to change by this court. A line of demarcation must be drawn somewhere, and bankruptcy seems to be a reasonable point on which to establish it. If failure of the company insuring the applicant should be held to be reason for exonerating the applicant, then responsibility for countless other causes of bankruptcy would also have to be determined. Even if it were conceded that the applicant had no responsibility regarding the insurance company, it could hardly be said that it had no control over the large amount of accident claims filed against it.

The rule or policy established by the Commission seems supported by the holding of the Supreme Court in the case of *Chicago Auditorium Association* v. *Central Trust Co., Trustee*, 240 U. S. 581, 591, in which the court said:

"• • • bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt."

When the court said:

"We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*"

it established an analogy for the Commission's rule that bankruptcy is within the control of the applicant.

The plaintiff and intervenor point out that if the original application had been acted upon promptly by the Commission, a certificate would have been granted, and that then it could not have been revoked unless the holder thereof had willfully failed to comply, within a reasonable time, not less than thirty days, with a lawful order of the Commission, commanding obedience to the law. Sec. 212(a). [fol. 135] This cannot be denied. If the application had been acted upon between February 12, 1936, the date of its filing, and October 5, 1937, the date of bankruptcy and interruption of service, it no doubt would have been allowed.

The evidence, however, does not disclose that the failure of the Commission to act upon the application within that time was arbitrary or intentional. The number of motor carriers entitled to "grandfather" rights was so great that all their applications under Section 306(a) could not possibly have been considered within such period. When in due course the Commission came to the consideration of plaintiff's application, it found that there had been an intervening interruption of service. That, so the Commission held, was as fatal as if applicant had not been in operation on June 1, 1935. The Commission construed the words of the statute "and has so operated since that time" to require continuity of operation from June 1, 1935 to the date of the determination of the application. The Commission had provided in Rule 6 of the regulations governing transfers that "the transfer of any operating right under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control".

The Commission declined in this case, as it had in former cases, to determine the rights of the applicant as of the date of the filing of the application. *Atlantic Motor Exp., Inc., Common Carrier Application*, 12 M. C. C. 576, 579-80. It is argued that this practice of the Commission varied from the strict practice of courts at common law. But even the courts have liberalized the practice in order that judgments and decrees might be influenced by conditions at the time they are made. Rule 15, Rules of Civil Procedure. This court cannot say that the rule of practice adopted by the

Commission has no rational basis or is contrary to law. Congress declared the purpose and policy of the Motor Carrier Act, 1935, to be "to promote adequate, economical and efficient service by motor carriers". Section 302. Continuity of operation is necessary to such service, and the requirement of continuity is not dispensed with when the application for a certificate is filed. The Commission is an administrative agency and its proper function requires a different procedure from that of courts of law. When the [fol. 136] sale from plaintiff to intervener was made; the "grandfather" rights had been lost through suspension of operation, and such rights had therefore been lost before the application was heard. Prior to the granting of the certificate the right of the plaintiff was merely tentative or inchoate and was lost by disuse. It would be unreasonable to expect the Commission to grant the application and then immediately start proceedings to revoke it. When the Commission refused permission to suspend, the applicant should have realized that operation was necessary to preserve "grandfather" rights.

This court cannot agree with the statement that the ruling of the Commission is contrary to the intent of Congress. The argument was advanced that—

"If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers * * * then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; * * * if a corporation, it could not be reorganized under the corporate reorganization provisions of the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable."

If, in such circumstances, the continuation of operations should seem warranted, the court having jurisdiction of the receivership or the bankruptcy could order such continuation at the very time that it took jurisdiction, and such operation would be lawful pending determination of the application for a certificate. Sec. 306(a). *Bankruptcy* Act, Secs. 2, 115, 112 (Title 11, Secs. 11, 515, 512 U. S. C.); *Lorain Steel Co.* v. *Union Ry.*, 165 Fed. 500; *Pomeroy's Equity Jurisprudence*, 4th ed., Sec. 1622.

In this case the condition of the bankrupt did not warrant a request for permission to operate. The bankrupt

was insolvent and had no insurance. The number of claims against it indicated the inadvisability of an order allowing operation without public liability insurance. In such case, the plaintiff's "grandfather" rights were lost, and the creditors must of course bear that loss along with the other results of bankruptcy. A sound public policy has always considered continuity of service necessary for the continuation of a franchise to use the public highways. Congress definitely expressed this public policy in the Motor Carrier Act. If the applicant in this case had continued its opera-[fol. 137] tions, its "grandfather" rights would have been preserved until the time of hearing the application. But, as the Commission said:

"While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished." (p. 20)

No sufficient reason is presented for interfering with the finding of the Commission, "that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the 'grandfather' clauses of the Act".

There were in fact three applications before the Commission, Nos. MC-51204 and MC-51088, both seeking certificates to authorize operations as a common carrier, and No. MC-51089, seeking a license to authorize operation as a broker. The Commission said: (Division 5)

"With respect to applicant's request for a broker's license, it should be noted that any rights which it may have had to continue brokerage operations cannot be transferred or sold to another party, *Spencer Broker Application*, 8 M. C. C. 141; and we conclude that applicant, being bankrupt, properly could not be granted such a license." (p. 261)

This court finds no reason to set aside, annul or suspend the order of the Commission.

Accordingly the order prayed for will be denied and the complaint dismissed at cost of plaintiff.

[fol. 138] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

APPLICATION FOR CONCLUSIONS OF LAW—Filed May 5, 1941

Now comes the Gregg Cartage & Storage Company and Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, plaintiffs herein, and the Northeastern Transportation Company, intervener herein, and respectfully request that the court make the following conclusions of law in the above entitled case:

1. The court finds that the discrimination created under the provisions of Section 212(a) of the Motor Carrier Act in favor of applicants whose certificates have already been acted upon and against applicants whose Grandfather rights are awaiting determination is in violation of the Constitution of the United States.

2. The court rejects the theory adopted by the Interstate Commerce Commission that in any cases where a suspension of operation was incident to bankruptcy or financial difficulties said suspension of operation would be deemed to be within the control of the applicant for Grandfather rights to prevent and finds that it is the duty of the Interstate Commerce Commission to determine each case upon the facts involved in that particular case as to whether or not the suspension was within the control of the applicant to prevent.

3. The court finds that Section 212(a) of the Motor Car-
[fol. 139] rier Act does apply to applicants for Grandfather rights whose application has not been acted upon by the Commission.

4. The findings of fact, upon which the order is based, is not supported by substantial evidence.

5. The Commission's order is not supported by the findings of fact.

6. The Commission's construction of the pertinent provisions of the act is incorrect.

7. The order is invalid.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs & Intervener, 840 Leader Building, Cherry 5344.

"Denied. Exceptions to Plaintiffs.
Jones, D. J. Allen, J. Wilkin, D. J."

5/5/41.

[fol. 140] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING APPLICATION FOR CONCLUSIONS OF LAW—May 5, 1941

This day this cause came on to be heard on plaintiff's application for conclusions of law, and was submitted to the Court; on consideration thereof, the Court denied said application, to which ruling of Court the plaintiffs, by their attorneys, except.

[fol. 141] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Findings of Fact and Conclusions of Law—Filed May 19, 1941

Pursuant to Rule 52 of the Rules of Civil Procedure the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On February 12, 1936 the plaintiff, Gregg Cartage & Storage Company, filed an application with the Interstate Commerce Commission, pursuant to Section 206(a) of the Motor Carrier Act, 1935, for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle, of general commodities, between

points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri and the District of Columbia, over regular and irregular routes. At the same time an alternative application was made under Section 209(a) for a permit as a contract carrier, and a license was sought authorizing operation as a broker. The three applications were heard and disposed of together.

2. In due course, the applications were referred to an examiner, who conducted hearings, received evidence, and on December 17, 1937, filed a report recommending that Gregg Cartage & Storage Company be granted a certificate of public convenience and necessity. Thereafter, on May [fol. 142] 4, 1938 the proceeding was reopened and referred to another examiner to ascertain the facts concerning the interruption of service which had resulted from the intervening bankruptcy of Gregg Cartage & Storage Company. On June 29, 1938, the examiner filed a report stating that in his opinion the interruption of service was one over which plaintiff, Gregg Company, had no control and recommending that a certificate of public convenience and necessity be issued.

3. Thereafter, Gregg Company's applications and the examiner's reports were reviewed by Division 5 of the Commission, and on November 14, 1938 the applications were denied. On December 12, 1939, after review by the full Commission, the decision of Division 5 was sustained.

4. The complaint in this case was filed on June 7, 1940. Northeastern Transportation Company was granted leave to intervene, and it filed an intervener's complaint. An answer was duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on January 29, 1941.

5. The record before the Commission shows that the plaintiff, Gregg Company, was in operation on June 1, 1935. During the year ended December 31, 1936, Gregg Company was insured against public liability on account of its motor carrier operations by the Central Mutual Insurance Company, and during that year approximately 175 claims for personal injury and property damage were made against it.

6. The record before the Commission further shows that in January, 1937, the Central Mutual Insurance Company was adjudged a bankrupt and ceased payment of all claims, leaving plaintiff, Gregg Company, with about $200,000 in liabilities, based on the face value of all claims, contingent and determined, which had been made against it. On October 4, 1937, plaintiff, Gregg Company, petitioned the Court of Common Pleas in Cuyahoga County, Ohio, for the appointment of an operating receiver. The next day certain creditors of Gregg Company filed a petition in involuntary bankruptcy against it in this Court, and on October 30, 1937 a receiver was appointed by this Court for the bankrupt estate.

[fol. 143] 7. The record before the Commission shows that the State court receiver, between October 5 and October 30, 1937, confined his operations to the delivery of shipments then en route and accepted no new business. The receiver appointed by this Court sought no authority to continue operations and, beginning October 30, 1937, confined his efforts to liquidating the business and disposing of freight on hand.

8. On December 6, 1937 the bankruptcy receiver sold at public auction, for $850.00, the good will and assets of the plaintiff, Gregg Company, including its rights under pending applications with the Interstate Commerce Commission, to Northeastern Transportation Company Intervener, herein. On January 7, 1938 Northeastern Transportation Company and the federal court receiver filed a joint request that Northeastern be substituted in place of the plaintiff, Gregg Company, in the pending proceedings on Gregg's applications. (Pursuant to Rule 6 of the Commission's regulations governing the transfer of operating rights, action on the application for substitution was held in abeyance by the Commission pending determination of Gregg Company's original application. The application for substitution was not formally denied until after the filing of the present suit.

9. The Commission construed the so-called "grandfather" provisos of sections 206(a) and 209(a) of the Motor Carrier Act, which were the provisions of the Act upon which Gregg Company's applications for operating rights as a carrier were based, to require continuous operation

until the grant of the applications, except as to interruptions of service over which the Company had no control.

10. The Commission held that bankruptcy is within the control of the bankrupt, as the word "control" is used in Sections 206(a) and 209(a) of the Act, and that a bankrupt is responsible in law for the consequences that flow from the adjudication.

[fol. 144] 11. The Commission found that there had been an interruption of service in the operations of Gregg Company, due to its insolvency and resulting involuntary bankruptcy, and held that the interruption of service disclosed by the facts was not an interruption over which the Company had no control within the meaning of Sections 206(a) and 209(a) of the Act.

12. The Commission held that Section 212(a) of the Act applies only to a carrier whose application for operating rights has been granted, and does not apply to one whose application is pending before the Commission.

13. The Commission concluded on the basis of the facts found that, by reason of the aforesaid interruption of service, the plaintiff, Gregg Company, had lost whatever claim it might otherwise have had to a so-called "grandfather" certificate.

14. The Commission further held that Northeastern Transportation Company was not entitled to be substituted in the proceedings on Gregg's applications.

Conclusions of Law

1. The Commission's report and order of December 12, 1939 were made after a full hearing.

2. The findings of fact upon which the order is based are supported by substantial evidence.

3. The Commission's order is supported by the findings of fact.

4. The Commission's construction of the pertinent provisions of the Act is correct.

5. The order is valid.

6. The complaint should be dismissed for want of equity. Exceptions to plaintiffs.

Florence E. Allen, United States Circuit Judge, Paul Jones, United States District Judge, R. N. Wilkin, United States District Judge.

[fol. 145] Approved: E. B. Freed, United States Attorney, F. B. Kavanagh, Asst. United States Attorney.

Approved as to Form: Howell Leuck & Bingham W. Zellmer, Counsel for Intervenor.

[fol. 146] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action. No. 20369

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*,

NORTHEASTERN TRANSPORTATION COMPANY, *Intervener*

FINAL DECREE—Filed May 19, 1941

This cause having come on for final hearing before the special court of three judges, constituted as required by the Act of October 22, 1913 (c. 32, 38 Stat. 219, U. S. C. Title 28, Sec. 47) and the Motor Carrier Act of 1935, Sec 205(h) (c. 498, 49 Stat. 543, U. S. C. Supp. 1, Title 49, Sec. 305(h)), and the Court having made and filed its findings of fact and conclusions of law, and upon consideration of the evidence and arguments of counsel orally and on brief, having concluded, found and determined that the complaint should be dismissed for want of equity.

It is Ordered, Adjudged and Decreed that the complaint be and the same is hereby dismissed for want of equity. Exceptions to plaintiffs.

Florence E. Allen, United States Circuit Judge, Paul Jones, United States District Judge, R. N. Wilkin, United States District Judge.

Notice by Clerk hereby waived.

Approved: E. B. Freed, United States Attorney, F. B. Kavanagh, Asst. United States Attorney. May 5th, 1941.

Approved as to Form: Howell Leuck & Bingham W. Zellmer, Counsel for Intervenor.

[fol. 147]. [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1941

The Gregg Cartage & Storage Company and Hugh Wells, Trustee in bankruptcy of the Gregg Cartage & Storage Company, plaintiffs, and the Northeastern Transportation company, intervener, in the above entitled cause, feeling themselves aggrieved by the final decree entered therein by this court on May 19, 1941, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignments of error accompanying this petition and to which reference is hereby made.

Said plaintiffs and intervener pray that a transcript of record, proceedings and papers on which said decree was made and entered duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs and Intervener, 840 Leader Building, Cherry 5344.

[fol. 148] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 14, 1941

The Gregg Cartage & Storage Company and Hugh Wells, Trustee in bankruptcy of the Gregg Cartage & Storage Company, plaintiffs, and the Northeastern Transportation Company, intervener, in the above entitled cause, now come and file the following assignment of errors in connection with their petition for an appeal from the final decree entered by this Court on May 19, 1941, in said cause:

The District Court erred:

1. In entering a decree affirming the order of the Interstate Commerce Commission.

2. In holding that the Commission, upon the facts, acted in accordance with the law in issuing its order denying plaintiffs' application for a certificate as an interstate motor carrier under the Grandfather's Clause of the Motor Carrier Act of 1935.

3. In holding, upon the facts, that approximately 175 claims for personal injury and property damage during the year ending December 31, 1936, were evidence of poor business management and were within the control of this plaintiff, the Gregg Cartage & Storage Company, under Section 206 of the Motor Carrier Act of 1935. (U. S. C. Title 29, Section 306).

4. In holding that, upon the facts found by the Commission's report of June 29, 1938 (Examiner A. F. Borrough's report) that the bankruptcy was within the control of the bankrupt as the word "control" is used in Sections 206A and 209A (U. S. C. Title 29, Sections 306A and 309A) of [fol. 149] the act and that the bankrupt is responsible in law for the consequences that flow from the adjudication.

5. In holding that the so-called "Grandfather" provisos—of Sections 206A and 209A of the Motor Carrier Act (U. S. C. Title 29, Sections 306A and 309A) which were the provisions of the Act upon which the plaintiff's, the Gregg Cartage & Storage Company, applications for operating rights as a carrier were based, require continuous operation until the grant of the applications.

6. In holding that the interruption of services in the operations of the plaintiff, the Gregg Cartage & Storage Company, was an interruption of services over which the company had control within the meaning of Sections 206A and 209A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Sections 306A and 309A).

7. In holding that Section 212A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Section 312A) applies only to a carrier whose application for operating rights has been granted and does not apply to one whose application is pending before the Commission.

8. In holding that the Commission's order was supported by evidence.

9. In holding that the Commission's construction of the pertinent provisions of the Act is correct.

10. In holding that the discrimination created under Section 212A of the Act (U. S. C. Title 29, Section 312A) is constitutional.

11. In holding that in any case where a suspension of the operation was incident to the bankruptcy of the applicant or financial difficulty of the applicant that such a suspension is within the control of the applicant to prevent, irrespective of the facts causing the bankruptcy or the financial difficulties.

12. In holding that the Commission had not exceeded its discretion in that it went beyond the mere fact of bankruptcy and upon exhaustive hearing determined that the bankruptcy was not due to any failure on the part of the applicant and then decided arbitrarily and against the evidence and upon strictly legalistic grounds that any bankruptcy under the Motor Carrier Act will be held to be the result of bad business management.

13. In overruling the plaintiffs' and intervener's application for conclusions of law.

[fol. 150] 14. In dismissing the plaintiffs' complaint and the intervening complaint of the Northeastern Transportation Company.

15. In entering a decree and judgment contrary to law.

16. In that the facts specifically found by the Court do not in law or fact support the judgment and decree entered herein.

17. In that as to each special finding of fact the record does not disclose substantial, competent evidence to support said finding.

18. In granting the application for findings of fact and conclusions of law submitted by the defendants, the United States of America and the Interstate Commerce Commission.

19. In affirming that part of the Interstate Commerce Commission's report wherein the said Commission refused or failed to make a finding as to the time when the "grandfather" rights expired.

20. In finding that the Commission acted in accordance with the law in failing to act upon the application for sub-

stitution filed on behalf of the Northeastern Transportation Company and finding that the continued interruption of service was due to the applicant, the Gregg Cartage & Storage Company.

Howell Leuck & Bingham W. Zellner, Attorneys for Plaintiffs and Intervener, 840 Leader Building, Cherry 5344.

[fol. 150a] Service of a copy of the foregoing Assignment of Errors is hereby acknowledged this 12th day of July 1941.

E. B. Freed, United States Attorney, by F. B. Kavanagh, Asst. U. S. Atty.

[fol. 151] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 14, 1941

The plaintiffs and intervener herein, having filed a petition for appeal to the Supreme Court of the United States from the judgment entered herein on the 19th day of May, 1941, and having filed their assignments of error, it is

Ordered that the appeal herein to the Supreme Court of the United States be, and it is hereby allowed, and it is further

Ordered that petitioners give bond in the sum of Three Hundred Dollars ($300.00), which shall serve as a supersedeas as well as a cost bond.

Jones, United States District Judge.

[fol. 152] Notice by clerk hereby waived.

Service of a copy of the foregoing order allowing appeal is hereby acknowledged this 12th day of July, 1941.

E. B. Freed, United States Atty. By F. B. Kavanagh, Asst. U. S. Atty.

[fols. 153-156] Citation in usual form showing service on the United States and Interstate Commerce Commission omitted in printing.

[fols. 157-158] Cost Bond on Appeal for $300 filed July 16, 1941, omitted in printing.

[fol. 159] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR TRANSMITTAL OF EXHIBITS—Filed July 22, 1941

Now come the Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and the Northeastern Transportation Company, and through their counsel, make application to this court for an order as provided for under Rule 10 of the Revised Rules of the Supreme Court, Paragraph 4, directing that the original papers attached to the Bill of Complaint filed in the captioned matter and known as Exhibit A, the report of William A. Maddens of January 6, 1936, Exhibit B, the evidence presented before Examiner A. F. Borroughs on May 4, 1938, Exhibit C, the report of Examiner A. F. Borroughs of June 29, 1938, Exhibit D, the report of Division 5 of the Interstate Commerce Commission of November 14, 1938, Exhibit E, the report of the Interstate Commerce Commission of December 12, 1939, and Exhibit A filed with the Clerk of the District Court of the United States for the Northern District of Ohio, Eastern Division, on January 29, 1941, the record of the Interstate Commerce Commission, be transmitted to the Supreme Court of the United States on appeal instead of a transcript thereof, and be included by the Clerk of the District Court in the transcript.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs and Intervener, 840 Leader Building, Cherry 5344.

[fol. 160] *Notice*

Defendants will please take notice that the plaintiffs and Intervener have filed the foregoing Motion and that the same will be on for hearing as soon as the court may conveniently hear the same.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs and Intervener.

Acknowledgment

Receipt of a copy of the foregoing Motion is hereby acknowledged this ——— day of July, 1941.

———, Attorneys for Defendant.

Copy left with D. Co.'s office, 7/22/41.

W. B. Zellmer.

[fol. 161] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DIRECTING TRANSMITTAL OF EXHIBITS—Filed July 15, 1941

Good causing appearing therefor:

It is ordered and decreed that the following exhibits before this court in this proceeding, to-wit:

1. Exhibit A, the report of William A. Maddens of January 6, 1936.
2. Exhibit B, the evidence presented before Examiner A. F. Borroughs on May 4, 1938.
3. Exhibit C, the report of Examiner A. F. Borroughs of June 29, 1938.
4. Exhibit D, the report of Division 5 of the Interstate Commerce Commission of November 14, 1938.
5. Exhibit E, the report of the Interstate Commerce Commission of December 12, 1939.
6. Exhibit A filed with the Clerk of the District Court of the United States for the Northern District of Ohio, Eastern Division, on January 29, 1941, the record of the Interstate Commerce Commission,

be transmitted to the Supreme Court of the United States on appeal, instead of transcript thereof.

R. N. Wilkin, Judge.

[fols. 162-163] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO ATTORNEY GENERAL OF OHIO—Filed July 23, 1941

To the Attorney General of the State of Ohio:

Pursuant to Title 28, Section 47(a) of the United States Code (Judicial Code, Section 210), you are hereby notified that the plaintiffs, the Gregg Cartage & Storage Company and Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and the intervener, the Northeastern Transportation Company, have taken an appeal to the Supreme Court of the United States from the final

decree entered by the District Court on May 19, 1941, in the above entitled cause, and the citation makes the appeal returnable within forty (40) days from the date thereof.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs and Intervener, 840 Leader Building, Cherry 5344.

Service of a copy of the above Notice is hereby acknowledged this 14th day of July, 1941.

Thomas J. Herbert, Attorney General of the State of Ohio. By: William M. Durkin.

[fol. 164] IN THE DISTRICT COURT OF THE UNITED STATES

No. 20369

GREGG CARTAGE & STORAGE COMPANY, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company,

vs.

1. UNITED STATES OF AMERICA,
2. INTERSTATE COMMERCE COMMISSION,
3. NORTHEASTERN TRANSPORTATION COMPANY (Intervenor by order of 9/20/40)

Basis of action—Appeal from Interstate Commerce Commission Ruling

Jury Trial claimed by Plaintiffs & Intervenor on Sept. 20, 1940

For Plaintiff & (3): Howell Leuck & Bingham W. Zellmer, 840 Leader Bldg.

For Defendant: Frank Coleman, Dept. of Justice; Washington, D. C. Daniel W. Knowlton, Interstate Commerce Commission, Washington, D. C.

DOCKET ENTRIES

6/7/40. Complaint filed.
6/7/40. Summons issued. 3 copies of summons to Marshal.
6/14/40. Summons ret. & filed. Served 6/8/40; Fees $2.00.
7/23/40. Answer of Interstate Commerce Commission filed. Served by mail 7/22/40.
7/26/40. Answer of The United States of America filed. Served by mail 7/23/40.

8/30/40. Motion of Northeastern Transportation Co. for leave to intervene filed. All served 8/30/40 except I. C. C. which was served by mail 8/30/40.

9/5/40. Notice for trial filed by plaintiff.

9/20/40. Order granting motion of Northeastern Transportation Co. for leave to intervene, filed & ent. Wilkin, J. Noted 9/20/40; Notice waived by Pltf. Notice mailed to Atty. for defendants.

9/20/40. Intervening complaint of Northeastern Transportation Co. filed. (Service waived to plaintiffs.)

9/20/40. Summons issued. 3 copies of summons to Marshal.

9/28/40. Intervening summons ret. & filed. U. S. served 9/24/40 and on same day by registered mail I. C. C. & Atty. General served. Fees $2.00.

[fol. 165] 10/4/40. Motion of Defendants to withdraw within cause from the jury calendar and place same on non-jury calendar filed. Served by mail 10/2/40.

10/4/40. Memorandum of defendants in support of motion filed. Served by mail 10/2/40.

10/10/40. Stipulation & Order that the Plaintiffs The Gregg Cartage and Storage Co. and Hugh Wells, receiver and the intervener the Northeastern Transportation Co. shall have to October 26, 1940 to file an answer brief to the defendants motion to strike filed.& ent. Wilkin, J. Noted 10/10/40; Notice waived.

10/18/40. Answer of Interstate Commerce Commission to Intervener's bill of complaint filed. Served by mail 10/18/40.

10/26/40. Brief of plaintiffs & intervener in opposition to motion of defendants to strike within cause from jury calendar, etc. filed. Served 10/26/40.

11/5/40. Reply brief of United States and Interstate Commerce Commission filed. Served by mail 11/5/40.

11/5/40. Answer of United States of America to Intervenor filed. Served by mail 11/5/40.

12/19/40. Memorandum opinion of Court filed. (Demands for Jury trial, motion to strike and Statutory Court.)

12/19/40. Copies of memo. to counsel.
12/31/40. Order sustaining defendants' motion to strike; overruling plaintiff's motion for Jury trial; and that the Court will entertain suit with three judges, filed & ent. Jones, J. Noted 12/31/40; Notices mailed.
1/4/41. Order that hearing in the above case will be January 29, 1941, at 10:00 a. m. before a three-judge court, Hon. Florence E. Allen and Hon. Robert N. Wilkin called to assist the Court to hear and determine the application, filed & ent. Jones, J. Noted 1/4/41.
[fol. 166] 1/4/41. 3 true copies of Order to counsel.
1/29/41. Hearing begun and concluded; taken under advisement, ent. Judges Allen, Jones and Wilkin. Noted 1/29/41. Notice mailed.
1/29/41. Exhibit "A" filed.
2/20/41. Memorandum opinion of Court filed. (Ruling of I. C. C. sustained.) Judges, Allen, Jones & Wilkin.
2/20/41. Copy of memo to Howell Leuck.
2/20/41. Copy of memo to Frank Coleman % F. B. Kavanagh.
2/20/41. Copy of memo to Daniel W. Knowlton % F. B. Kavanagh.
5/5/41. Application for conclusions of law filed by Plaintiff.
5/5/41. Order denying application for conclusions of law entered, Allen, J., Jones, J., Wilkin, J. Noted 5/21/41. Notice mailed.
5/19/41. Findings of Fact and conclusions of law filed.
5/19/41. Final Decree filed and entered; Complaint dismissed, Judges Allen, Jones & Wilkin. Noted 5/19/41. Notice waived.
7/14/41. Petition of Plaintiff for appeal filed.
7/14/41. Assignment of Errors filed.
7/14/41. Order allowing appeal, fixing bond in the sum of $300.00, filed & ent. Jones, J. Noted 7/14/41. Notice waived.
7/14/41. Citation issued. Returnable 8/23/41. (40 days.)
7/15/41. Statement directing attention to provisions of certain revised rules of the Supreme Court filed. Served 7/15/41.
7/15/41. Statement as to jurisdiction filed. Served 7/15/41.

7/16/41. Bond on appeal filed. (St. Paul-Mercury Indemnity Co.)

7/17/41. Citation retd. & filed. Served 7/14 and 7/16/41.

7/17/41. Acknowledgment of service of appeal matters filed.

7/22/41. Motion of Gregg Cartage & Storage Co., Hugh Wells, Trustee etc. and the Northeastern Transportation Company that the original papers attached to the Bill of Complaint, and record of Interstate Commerce Commission be transmitted to the Supreme Court on appeal instead of transcript thereof filed. Served 7/22/41.

[fol. 167] 7/22/41. Order that Defendant's Ex. "A" to "E" inc. and Plaintiff's Ex. "A" be transmitted to Supreme Court instead of transcript thereof, filed & ent., Wilkin, J. Noted 7/22/41. Notice waived.

7/23/41. Notice of appeal to the Attorney General of the State of Ohio filed. Served 7/14/41.

7/23/41. Precipe for transcript of record filed. Served 7/23/41.

7/25/41. Acknowledgment of copies of precipe for transcript of record, motion for order directing part of original record to be transmitted on appeal, and order directing part of original record to be transmitted on appeal filed.

[fol. 168] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed July 23, 1941

To the Clerk:

You will please prepare a transcript of the record in the above entitled cause to be transmitted to the Clerk of the Supreme Court of the United States pursuant to the appeal heretofore taken, and include in said transcript the following:

1. Bill of Complaint.
2. Answer of the Interstate Commerce Commission.

3. Answer of the United States of America.

4. Motion of the Northeastern Transportation Company for leave to intervene.

5. Order granting motion of the Northeastern Transportation Company to intervene.

6. Intervening Bill of Complaint of the Northeastern Transportation Company.

7. Answer of the United States of America to the intervening Bill of Complaint.

8. Answer of the Interstate Commerce Commission to the intervening Bill of Complaint.

9. Order convening the three-judge District Court.

10. Journal Entry of hearing begun and concluded.

11. Memorandum of Opinion sustaining the ruling of the Interstate Commerce Commission.

[fol. 169] 12. Application for conclusions of law filed on behalf of the plaintiffs and intervener.

13. Order denying the application.

14. The findings of fact and conclusions of law.

15. The final decree.

16. Petition of plaintiffs and intervener for appeal.

17. Assignment of Errors.

18. Order allowing appeal.

19. Citation on appeal.

20. Notice (pursuant to Rule 12 of the Supreme Court) of service on appellees of the petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction and acknowledgement of service thereof.

21. Statement directing attention to provisions of certain revised rules of the Supreme Court.

22. Statement as to Jurisdiction.

23. Appeal bond.

24. Motion for order permitting withdrawal and transmission of Exhibits A, B, C, D and E, and Exhibit A to be filed with the Supreme Court as originals.

25. Order granting motion.

26. Exhibits A, B, C, D and E attached to the plaintiffs' Bill of Complaint and Exhibit A filed with the Clerk of Courts (see Nos. 24 and 25.)

27. Notice to Attorney General of Ohio and acknowledgement of service thereof.
28. Docket entries in proper order.
29. Precipe for transcript of record.
30. Clerk's certificate.

Howell Leuck & Bingham W. Zellmer, Attorneys for Plaintiffs and Intervener, 840 Leader Building, Cherry 5344.

[fol. 170] Service of the above Precipe is hereby acknowledged this 23rd day of July, 1941.

F. B. Kavanagh, Asst. United States Atty.

July 29, 1941.

The within Praecipe for Transcript of Record herein approved.

F. B. Kavanagh, Asst. United States Attorney.

[fol. 171] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 172] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD TO BE PRINTED—Filed August 21, 1941

1

The Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and the Northeastern Transportation Company, appellants, state that in their brief and oral argument on their appeal in the above entitled cause they will rely upon all the points stated in their assignment of errors therein.

2

The portions of the record which the appellants think necessary for the consideration thereof are as follows:

1. Bill of Complaint with Exhibits A, B, C, D and E attached thereto.
2. Answer of the Interstate Commerce Commission.

3. Answer of the United States of America.

4. Motion of the Northeastern Transportation Company for leave to intervene.

5. Order granting motion of the Northeastern Transportation Company to intervene.

6. Intervening Bill of Complaint of the Northeastern Transportation Company.

7. Answer of the United States of America to the intervening Bill of Complaint.

8. Answer of the Interstate Commerce Commission to the intervening Bill of Complaint.

9. Order convening the three-judge District Court.

10. Journal Entry of hearing begun and concluded.

11. Memorandum of Opinion sustaining the ruling of the Interstate Commerce Commission.

[fols.173-175] 12. Application for conclusions of law filed on behalf of the plaintiffs and intervener.

13. Order denying the application.

14. The findings of fact and conclusions of law.

15. The final decree.

16. Petition of plaintiffs and intervener for appeal.

17. Assignment of Errors.

18. Order allowing appeal.

19. Citation on appeal.

20. Notice (pursuant to Rule 12 of the Supreme Court) of service on appellees of the petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction and acknowledgement of service thereof.

21. Statement directing attention to provisions of certain revised rules of the Supreme Court.

22. Statement as to Jurisdiction.

23. Appeal Bond.

24. Motion for order permitting withdrawal and transmission of Exhibits A, B, C, D and E, and Exhibit A to be filed with the Supreme Court as originals.

25. Order granting motion.

26. Notice to Attorney General of Ohio and acknowledgement of service thereof.

27. Docket entries in proper order.

28. Precipe for transcript of record.

29. Clerk's certificate.

30. Stipulation of appellants and appellees with reference to the using of the original Exhibit A filed at the trial of this case in the District Court.

The foregoing items should be printed by the Clerk of this court.

Howell Leuck, Bingham W. Zellmer, Attorneys for Appellants, 840 Leader Building, Cleveland, Ohio. Cherry 5344.

[fol. 176] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE USE OF EXHIBIT A—Filed August 21, 1941

It is hereby agreed and stipulated by and between counsel for the appellants and counsel for the appellees that Exhibit A, the original record of the Interstate Commerce Commission which was filed in the District Court during the trial of this case and which has been transmitted as an original exhibit to the Clerk of the Supreme Court of the United States, may be referred to by counsel in their brief and oral argument on the appeal in the above entitled cause as though the exhibit were printed in the record.

Howell Leuck, Bingham W. Zellmer, Attorneys for Appellants. —— ——, Attorney General of the U. S. Charles Fahy, Acting Solicitor General of the U. S. Daniel H. Kunkel, Counsel for Interstate Commerce Commission.

Endorsed on Cover: File No. 45863, D. C. U. S. Northern Ohio. Term No. 535. Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants, vs. The United States of America and Interstate Commerce Commission. Filed August 21, 1941. Term No. 535 O. T. 1941.

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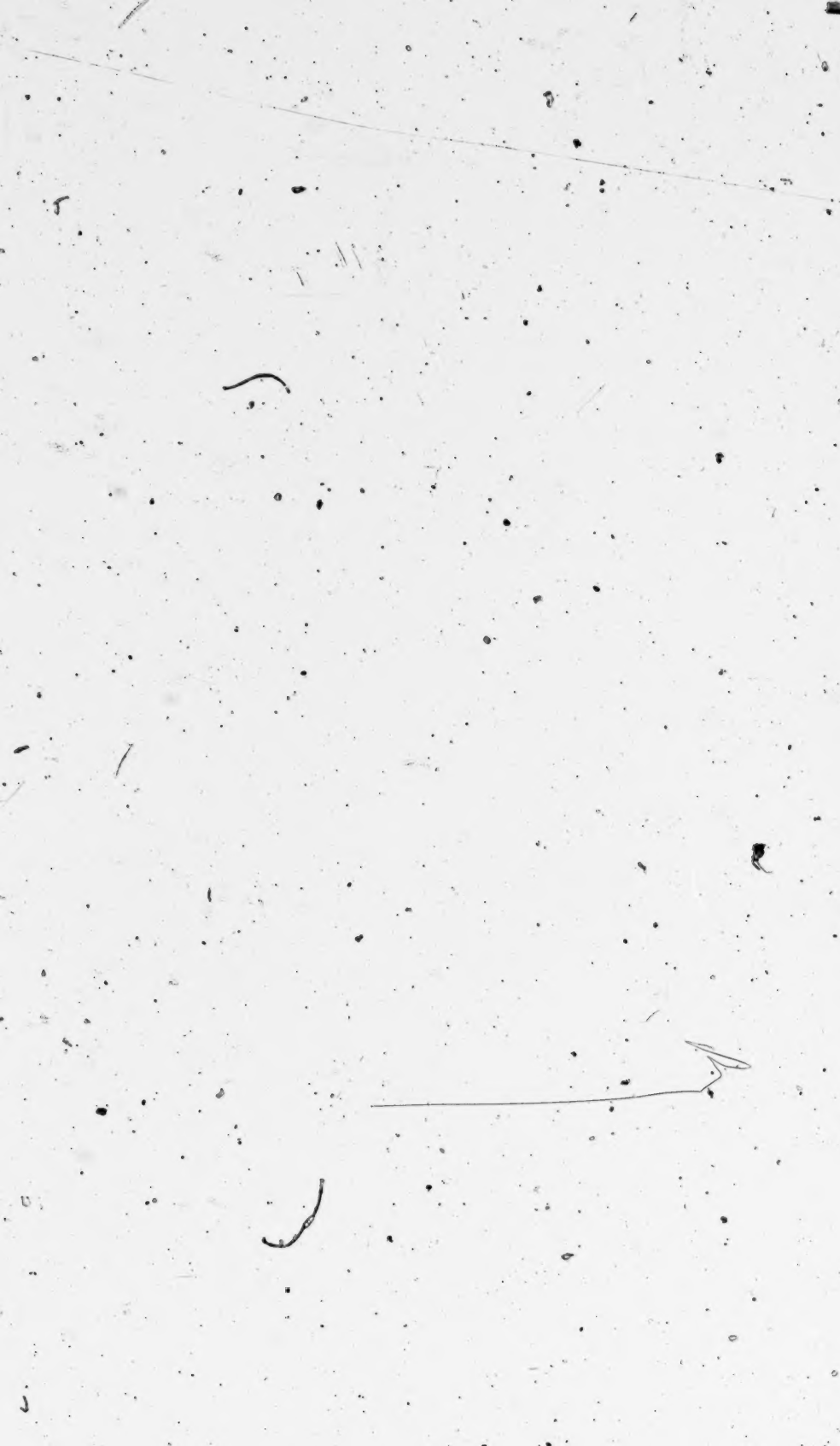

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 535

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE & STORAGE COMPANY, AND NORTHEASTERN TRANSPORTATION COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION.

HOWELL LEUCK,
BINGHAM W. ZELLMER,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 535

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE & STORAGE COMPANY, AND NORTHEASTERN TRANSPORTATION COMPANY,

Appellants,

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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the Gregg Cartage & Storage Company, Hugh Wells, Trustee in bankruptcy of the Gregg Cartage & Storage Company, and the Northeastern Transportation Company submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain jurisdiction are Sections 238 of the Judicial Code as amended by

the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345) and Title 28, Section 47a, of the United States Code, and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * *."

B. The Statute of the United States, a construction of which is involved herein, is the Act of August 9, 1935, 54 Stat. 923, 919 and 924; Title 49, Sections 306(a), 309(a) and 312 of the United States Code; also known as Sections 206(a), 209(a) and 212 of the Motor Carriers Act of 1935, contain the following provisions:

> Section 206(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 306; 54 Stat. L. 923) prohibits a common carrier by motor vehicle to operate unless it has first received a certificate of public convenience and necessity. It is provided, however, that if any such carrier or its predecessor in interest was in bona fide operation on July 1, 1935 "and has so operated since that time * * * except * * * as to interruptions of service from which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, * * *."
>
> Section 209(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 309; 54 Stat. L. 919) contains similar provisions concerning contract carriers and provides that instead of a certificate of convenience and necessity that a permit shall be issued to such contract carrier.

Section 212(a). (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 312; 54 Stat. L. 924) provides that certificates, permits and licenses shall be effective from the date specified therein and shall remain effective until suspended or terminated. It further provides that any certificate, permit or license may be amended or revoked, in whole or in part, upon the application of the holder thereof or may, upon complaint or the Commission's own initiative, "be suspended, changed, revoked in whole or in part for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. Provided, however, that no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder."

Section 212(b) reads as follows:

Except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

C. The decree sought to be reviewed was entered on May 19, 1941; and the petition for appeal was presented to the District Court on July 14, 1941.

D. This action grows out of the Motor Carriers Act (Title 49, Section 304 of the U. S. C.) under which the Interstate

---

[1] Section 212(a), as originally added to on August 9, 1935, contained a ninety-day provision rather than a thirty-day one as provided in the above act. This clause was amended as of June 29, 1938.

Commerce Commission, on June 1, 1935, assumed jurisdiction of all motor trucking companies engaged in transporting merchandise from State to State.

By the provisions of the Act, those motor carriers who have been in operation prior to the enactment were entitled to be granted a certificate to continue in business without any showing other than prior operations and these rights were commonly known as "Grandfather Rights". We believe it is conceded that the Gregg Cartage & Storage Company had qualified in every respect for such a certificate and there is nothing in the record to indicate that it would not have received its certificate except for certain incidents which occurred after it had filed its appliation for a certificate.

These incidents began about October 30, 1937 and may be attributed to an involuntary petition in bankruptcy pending for a period extending from October 30, 1937 to early in January, 1938. Prior to January, 1938, the intervening petitioner, Northeastern Transportation Company, had purchased the operating rights from the trustee in bankruptcy and had promptly filed an application to file tariffs and resume service. An application for a certificate of public convenience and necessity was filed and was set for hearing and on December 17, 1937, the examiner recommended that the Gregg Cartage & Storage Company of Cleveland, Ohio, be granted a certificate of public convenience and necessity under the "Grandfather's Clause" of the Motor Carrier Act of 1935. This recommendation was based upon a finding that the applicant was operating as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over irregular routes between points in Ohio, West Virginia, Pennsylvania, New York, New Jersey, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Indiana, Michigan, Illinois, Missouri and the District of Columbia by reason of having been engaged in

such operation on June 1, 1935 and continuously since that time.

Thereafter, on April 8, 1938, the Interstate Commerce Commission set the application of the Gregg Cartage & Storage Company for further hearing.

On May 4, 1938, a hearing was had in accordance with the above-mentioned notice, after the Examiner ruled as follows:

> "The order of the Commission doesn't designate specifically what the issues are, as you know, counsel. However, it is the Examiner's understanding, and he now rules, that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of a receiver of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding, you may proceed."

On the 29th day of June, 1938, the Examiner made his report based upon the evidence presented before him on May 4, 1938, and recommended that the Commission find that the interruption of service was one over which applicant has no control and that the applicant be authorized to resume operations as a common carrier by motor vehicle of general commodities in interstate or foreign commerce over the routes and between the points set out in the prior report.

Exceptions were seasonably filed to the said report and thereafter on November 14, 1938, Division 5 of the Interstate Commerce Commission denied the application on the grounds that there had been an interruption of service within the control of the applicant and that all "grandfather" rights were lost thereafter.

The Gregg Cartage & Storage Company seasonably filed its petition for re-argument and re-consideration of its

application before the entire Interstate Commerce Commission, and on April 13, 1939, the Interstate Commerce Commission heard an oral argument on the said application, and on December 12, 1939, the Commission affirmed the report of Division 5. To this affirmation the applicant filed its petition requesting a re-argument and re-consideration before the entire Commission, which application was denied by the Commission on April 8, 1940.

On November 13, 1937, the Federal Court Receiver for the Gregg Cartage & Storage Company filed an application to sell the "grandfather" rights to the Northeastern Transportation Company, which sale was confirmed by the United States District Court for the Northern District of Ohio, Eastern Division, on December 6, 1937. The purchaser immediately filed its application with the Interstate Commerce Commission seeking to be substituted for the original applicant, the Gregg Cartage & Storage Company. This application was dismissed by the Commission on June 13, 1940, after the petition of the applicant had been filed in the District Court of the United States for the Northern District of Ohio, Eastern Division, and on August 29, 1940, a petition was filed on behalf of the Northeastern Transportation Company for re-argument and re-consideration before the entire Interstate Commerce Commission on the question of the application for substitution which had been filed by the purchaser. This petition was denied by the Interstate Commerce Commission on November 13, 1940. Plaintiffs then brought suit in the District Court of the United States for the Northern District of Ohio, Eastern Division, and the Northeastern Transportation Company filed its intervening petition, both petitioners seeking to enjoin and annul the order issued by the Interstate Commerce Commission. A final hearing was held by the District Court of three judges, one of whom was a Circuit Judge, and the Court entered its judgment and found that

there was no reason to set aside, annul or suspend the order of the Commission. A copy of the opinion of the District Court is appended hereto, together with the Court's findings of fact and conclusions of law.

E. The questions presented are substantial and of great importance both to numerous motor carriers claiming "grandfather" rights to certificates and to the Commission before which a large number of applications for certificates under the "grandfather" clause are pending. The District Court's decision in this case is the first by any Court on the questions involved in this appeal.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *Maher*, 307 U. S. 148;
United States v. *Pan American Petroleum Corp.*, 304 U. S. 156;
B. & O. R. R. Co. et al. v. *United States*, 304 U. S. 58.
Escanaba & Lake Superior R. R. Co. v. *United States*, 303 U. S. 315;
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.
Youngstown Sheet & Tube Co. v. *United States*, 295 U. S. 476.

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APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Filed Feb. 20, 1941. C. B. Watkins, Clerk. U. S. District Court N. D. O.

Civil Action No. 20369.

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants.

NORTHEASTERN TRANSPORTATION COMPANY, Intervener.

Opinion.

Before Allen, Circuit Judge, Jones and Wilkin, District Judges.

PER CURIAM:

This action was brought under Sec. 41(28), 43-48 Title 28 U. S. C., to set aside, annul or suspend an order of the Interstate Commerce Commission which denied the plaintiff's application for certificate of convenience and necessity, as provided for in Sec. 306(a) Title 49 U. S. C.

The Intervener, Northeastern Transportation Company, claims to have succeeded to the rights and interests of the plaintiff by virtue of sale and assignment from the receiver of the bankrupt estate of the plaintiff. (Sec. 45a, Title 28 U. S. C.)

There is no dispute as to the essential facts. The question presented is whether the ruling upon the facts by the Commission is justified in law.

The undisputed evidence shows that the plaintiff was in operation on June 1, 1935, and was therefore entitled to the rights specified in Sec. 306(a) Title 49 U. S. C., known as "grandfather" rights. On February 12, 1936, the plaintiff filed an application for certificate of authorization. Plaintiff was at that time insured against public liability by the Central Mutual Insurance Company, and in Janu-

ary, 1937, such insurance company was adjudged a bankrupt and ceased payment of all claims, leaving the plaintiff with about $200,000 of liabilities. Being unable to discharge such obligations, the plaintiff asked for the appointment of a receiver in the common pleas court of Cuyahoga County, Ohio, on October 4, 1937. At the same time creditors filed a petition in bankruptcy, and the plaintiff was adjudged bankrupt by this court (West, J.). On October 14, 1937, plaintiff made application to the Interstate Commerce Commission for permission to suspend operations without prejudice to its "grandfather" rights. Such permission was denied for want of authority by the Commission. On October 30, 1937, a receiver was appointed for the bankrupt estate, and, on December 6, 1937, the good will and assets of the plaintiff, including its rights under pending applications with the Commission, were sold by the receiver at public auction to the Intervener for $850.

The state court receiver, between October 5 and October 30, confined his operations to deliveries of shipments then *en route*. No new business was accepted. The federal court receiver sought no authority to continue operations and confined his efforts to liquidating the business. After sale, the federal court receiver and the Intervener filed a joint request that the Intervener be substituted as applicant for plaintiff's "grandfather" rights. Action on the application for substitution was held in abeyance by the Commission pending determination of plaintiff's original application. Pending determination of such applications, no operations were engaged in by the Intervener, although it had asked permission to file tariffs and resume service.

The original application was referred to an Examiner, who, on December 17, 1937, recommended allowance of the application. The matter was referred again to an Examiner for further hearing on the question of "discontinuance of operation". Hearing was had on May 4, 1938, and on June 29 the Examiner recommended that applicant be granted a certificate because the interruption in service was one beyond applicant's control. In November, 1938, the application and the Examiner's report were reviewed by Division 5 of the Commission and the application was

denied. On December 12, 1939, after review by the full Commission, the decision of Division 5 was sustained, upon the ground that the interruption of service following bankruptcy was fatal to applicant's rights.

Section 306(a) provides that a carrier in operation on June 1, 1935, shall be granted a certificate provided it has operated *bona fide* since that time. But it excepts from the requirement as to operation "interruption of service over which the applicant or its predecessor in interest had no control". The plaintiff and the intervener contend that the evidence reveals a state of facts "over which the applicant or its predecessor in interest had no control". It is their view that the interruption of service was due entirely to the failure of the insurance company, which created a condition clearly beyond their control.

The Commission, however, declined to look beyond the bankruptcy. It held bankruptcy to be a matter within the control of the applicant without considering the causes of bankruptcy. Such a ruling by the Commission is the adoption of a proper administrative policy or the application of a rule of law, and in either case it seems to be a proper exercise of its authority and not subject to change by this court. A line of demarcation must be drawn somewhere, and bankruptcy seems to be a reasonable point on which to establish it. If failure of the company insuring the applicant should be held to be reason for exonerating the applicant, then responsibility for countless other causes of bankruptcy would also have to be determined. Even if it were conceded that the applicant had no responsibility regarding the insurance company, it could hardly be said that it had no control over the large amount of accident claims filed against it.

The rule or policy established by the Commission seems supported by the holding of the Supreme Court in the case of Chicago Auditorium Association v. Central Trust Co., Trustee, 240 U. S. 581, 591, in which the court said:

"* * * bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt".

When the court said:

"We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of Rochm *v.* Horst, supra."

it established an analogy for the Commission's rule that bankruptcy is within the control of the applicant.

The plaintiff and intervener point out that if the original application had been acted upon promptly by the Commission, a certificate would have been granted, and that then it could not have been revoked unless the holder thereof had willfully failed to comply, within a reasonable time, not less than thirty days, with a lawful order of the Commission, commanding obedience to the law. Sec. 212(a). This cannot be denied. If the application had been acted upon between February 12, 1936, the date of its filing, and October 5, 1937, the date of bankruptcy and interruption of service, it no doubt would have been allowed.

The evidence, however, does not disclose that the failure of the Commission to act upon the application within that time was arbitrary or intentional. The number of motor carriers entitled to "grandfather" rights was so great that all their applications under Section 306(a) could not possibly have been considered within such period. When in due course the Commission came to the consideration of plaintiff's application, it found that there had been an intervening interruption of service. That, so the Commission held, was as fatal as if applicant had not been in operation on June 1, 1935. The Commission construed the words of the statute "and has so operated since that time" to require continuity of operation from June 1, 1935 to the date of the determination of the application. The Commission had provided in Rule 6 of the regulations governing transfers that "the transfer of any operating right under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control".

The Commission declined in this case, as it had in former cases, to determine the rights of the applicant as of the date of the filing of the application. Atlantic Motor Exp. Inc., Common Carrier Application, 12 M. C. C. 576, 579-80. It is argued that this practice of the Commission varied from the strict practice of courts at common law. But even the courts have liberalized the practice in order that judgments and decrees might be influenced by conditions at the time they are made. Rule 15, Rules of Civil Procedure. This court cannot say that the rule of practice adopted by the Commission has no rational basis or is contrary to law. Congress declared the purpose and policy of the Motor Carrier Act, 1935, to be "to promote adequate, economical and efficient service by motor carriers". Section 302. Continuity of operation is necessary to such service, and the requirement of continuity is not dispensed with when the application for a certificate is filed. The Commission is an administrative agency and its proper function requires a different procedure from that of courts of law. When the sale from plaintiff to intervener was made, the "grandfather" rights had been lost through suspension of operation, and such rights had therefore been lost before the application was heard. Prior to the granting of the certificate the right of the plaintiff was merely tentative or inchoate and was lost by disuse. It would be unreasonable to expect the Commission to grant the application and then immediately start proceedings to revoke it. When the Commission refused permission to suspend, the applicant should have realized that operation was necessary to preserve "grandfather" rights.

This court cannot agree with the statement that the ruling of the Commission is contrary to the intent of Congress. The argument was advanced that—

"If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers * * * then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; * * * if a corporation, it could not be reorganized under the corporate reorganization provisions of

the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable."

If, in such circumstances, the continuation of operations should seem warranted, the court having jurisdiction of the receivership or the bankruptcy could order such continuation at the very time that it took jurisdiction, and such operation would be lawful pending determination of the application for a certificate. Sec. 306(a). Bankruptcy Act, Secs. 2, 115, 112 (Title 11, Secs. 11, 515, 512 U. S. C.); Lorain Steel Co. v. Union Ry., 165 Fed. 500; Pomeroy's Equity Jurisprudence, 4th ed., Sec. 1622.

In this case the condition of the bankrupt did not warrant a request for permission to operate. The bankrupt was insolvent and had no insurance. The number of claims against it indicated the inadvisability of an order allowing operation without public liability insurance. In such case, the plaintiff's "grandfather" rights were lost, and the creditors must of course bear that loss along with the other results of bankruptcy. A sound public policy has always considered continuity of service necessary for the continuation of a franchise to use the public highways. Congress definitely expressed this public policy in the Motor Carrier Act. If the applicant in this case had continued its operations, its "grandfather" rights would have been preserved until the time of hearing the application. But, as the Commission said:

"While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished" (p. 20).

No sufficient reason is presented for interfering with the finding of the Commission, "that applicant, because of the described interruption in service, has failed to establish the right to a certificate or permit under the 'grandfather' clauses of the Act".

There were in fact three applications before the Commission, Nos. MC-51204 and MC-51088, both seeking certificates

to authorize operations as a common carrier, and No. MC-51089, seeking a license to authorize operation as a broker. The Commission said (Division 5):

"With respect to applicant's request for a broker's license, it should be noted that any rights which it may have had to continue brokerage operations cannot be transferred or sold to another party, Spencer Broker Application, 8 M. C. C. 141; and we conclude that applicant, being bankrupt, properly could not be granted such a license" (p. 261).

This court finds no reason to set aside, annul or suspend the order of the Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 535.

GREGG CARTAGE & STORAGE COMPANY,
HUGH WELLS,
Trustee in Bankruptcy of the Gregg Cartage & Storage Company,
and
NORTHEASTERN TRANSPORTATION COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 535.

GREGG CARTAGE & STORAGE COMPANY,
HUGH WELLS,
Trustee in Bankruptcy of the Gregg Cartage & Storage Company,
and
NORTHEASTERN TRANSPORTATION COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The per curiam opinion of the especially constituted district court entered on February 20, 1941, is not officially reported. It is found in the record on pages 99 to 104 inclusive.

JURISDICTION.

Stated in general terms of ultimate legal effect jurisdiction of this Court is invoked on the grounds that this is a direct appeal from the final judgment and decree of a statutory three-judge court, sitting as the District Court of the United States for the Northern District of Ohio (R. 98), denying the appellants' prayer for relief, namely, that the order of the Interstate Commerce Commission be set aside and annulled and that the Court issue an order requiring the Interstate Commerce Commission to issue a certificate of public convenience and necessity to the Gregg Cartage & Storage Company and therefore within the jurisdiction of this Court by reason of the provisions of Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 93, par. 4); U. S. C. Title 28, Section 345 and also under Section 47(a) of the Title 28 U. S. C.

The facts of the case substantiating the foregoing general statement and showing the court's jurisdiction to attach mentioned, have been set forth at length in an Appellants' Jurisdictional Statement, heretofore filed in the District Court below, and heretofore printed by the Clerk of this Court, and an expanded, detailed statement of the same facts is set forth of necessity in the "Statement of the Case" appearing immediately following this statement in this brief. No useful purpose would be served by repetition of the statement of the jurisdictional facts, and, in the interest of brevity, we beg leave to omit restating them in this section of the brief, and invite the Court's attention to the immediately succeeding section hereof and to ask that it be read and considered as a part of our statement of the grounds upon which the Court's jurisdiction is invoked.

STATEMENT OF FACTS.

The Gregg Cartage & Storage Company originally started business in 1920 when Joseph Gregg commenced operating with a single truck. By 1925 the business had so increased that it was advisable to incorporate the company. In 1932 the company instituted interstate transportation operations and in 1934 registered under the Code of Fair Competition with National Recovery Administration. The interstate operations of The Gregg Cartage & Storage Company extended from St. Louis, Missouri to Boston, Massachusetts, and terminals were maintained in all the large cities along the various routes used by the company, including Cleveland, Ohio; New York City, New York; Detroit, Michigan; Chicago, Illinois; Pittsburgh, Pennsylvania; and Baltimore and Hagerstown, Maryland. (Complaint R. 1, 2.)

On February 12, 1936 The Gregg Cartage & Storage Company filed its application for a certificate of public convenience and necessity as provided for in Section 206-A of Part II, Interstate Commerce Act, 54 Stat. 923; 49 U. S. C. Sec. 306(a). The application was referred to William A. Maidens, an Examiner of the Interstate Commerce Commission, who conducted a hearing, and on December 17, 1937, found that the applicant was entitled to a certificate of public convenience and necessity under the so-called Grandfather's Clause of the Motor Carriers Act of 1935, the statute cited above, because "the applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle * * *." (Complaint R. 2, 3; Report of Maidens, R. 14.) At the time of filing the application it had approximately two hundred twenty (220) trucks in operation, and in the year 1936 it had an income of approximately two million dollars freight revenue; delivered seven thousand five hundred cars of freight to one railroad.

For about one year prior to January 1, 1937, public liability and property damage insurance was carried with The Central Mutual Insurance Company of Chicago, Illinois. On or about December 31, 1936, The Gregg Cartage & Storage Company cancelled its insurance contract with that company because of rumors that the company was facing bankruptcy and was failing to settle claims of the Gregg Company arising from accidents which had occurred between October, 1935 and December 31, 1936, the period during which the Gregg Company was insured with the Central Mutual Insurance Company. (Testimony of Resnick, R. 25, 26.)

On or about January 11, 1937, the Central Mutual Insurance Company became insolvent and being an Illinois Corporation, under the laws of that state, the Department of Insurance assumed control, a receiver was appointed and any payment of claims ceased. The receiver by a circular letter advised all policy holde that he would not defend or take any further interest in cases against any of the assureds. January 1, 1937, the Gregg Company became insured with the Auto Mutual Insurance Company, paying advance premiums as required, and remained insured with that company until October 4, 1937, when a receiver was appointed for the Gregg Company. The policies with both companies were approved and accepted by the Public Utilities Commission of Ohio and the Interstate Commerce Commission. (R. 26.)

On January 11, 1937 when the Gregg Company received notice of the insolvency of the Central Mutual Insurance Company, it immediately turned over its entire file concerning claims covered by insurance with that company to its lawyers with instructions to "see what they could do with all the various causes that were pending that the Central Mutual had not taken care of." (Testimony of Resnick, R. 27.) After a thorough investigation and expenditure of a large amount of money for railroad fare and

employment of counsel in other cities, counsel for the Gregg Company estimated that the total amount of claims could be settled for between twenty and forty thousand dollars including counsel fees and other expenses. The Gregg Company faced no difficulty in discharging the ordinary obligations of the company; but the extraordinary obligations of paying advance insurance premiums to the Auto Mutual Company and the disposition of approximately one hundred seventy-five claims, many of which had matured into law suits, all of which should have been disposed of by insurance companies, overtaxed the resources of the company and the ingenuity of counsel. (Testimony of Leuck, R. 31.)

The Gregg Company had also been previously insured with the Monarch Insurance Company and Sun Insurance Company and had paid out to customers in order to hold their good will approximately thirty thousand dollars, the insurance companies having refused to pay the claims on technical grounds. (Cross examination of Leuck, R. 33.)

In spite of the extraordinary demands made upon it the Gregg Company continued its operations without diminution as a common carrier by motor vehicle. Officials of the company and counsel "finally reached the conclusion that in justice to the creditors and in the interest of sound public policy, the Gregg Company should ask for a receivership which would stay legal proceedings, except as permitted by the Court and under those circumstances we could operate." (Testimony of Leuck, R. 31.)

On October 4, 1937, upon application to the Common Pleas Court of Cuyahoga County, Ohio, an operating receiver was appointed and took possession of the business and the assets of the Gregg Company on the morning of October 5, 1937. The receiver had authority to and did continue the operations of the Gregg Company. He accepted no new business, but took care of the business which the company already had, taking out individual policies of in-

surance on each load of freight moved. (Testimony of Leuck, R. 40.)

On October 5, 1937, an involuntary petition in bankruptcy was filed in the District Court of the United States, for the Northern District of Ohio, Eastern Division, and on October 27, 1937, The Gregg Cartage & Storage Company was adjudicated bankrupt by the District Court of the United States. On October 30, 1937, a custodian receiver, without authority to operate, was appointed. (Testimony of Leuck, R. 39.) The receiver took all necessary steps to protect all of the assets of the company, including its operating rights, but did not continue any operations of the company, and on November 13, 1937, the bankruptcy receiver filed an application to sell the operating rights of the bankrupt corporation to the Northeastern Transportation Company, which sale was confirmed by the District Court on December 6, 1937. (Intervener's Bill of Complaint, R. 91, 92.)

The Northeastern Transportation Company on January 7, 1938, filed with the Interstate Commerce Commission its application for substitution as applicant in the proceedings then pending before the Interstate Commerce Commission and made repeated requests to the Commission for action thereon, which requests were ignored. (Intervener's Bill of Complaint, R. 92.) The application for substitution was denied on June 13, 1940, after the institution of the action before the statutory three-judge court. (Answer of Interstate Commerce Commission to Intervener's Bill of Complaint, R. 95, 96.)

After the sale of the rights to Northeastern Transportation Company, certain operations were started by it preparatory to commencing business, but these operations "were suspended at the urgent request of Roy M. Snetzer, District Director of * * * the Interstate Commerce Commission and his assistant, William Hubbard." (Intervener's Bill of Complaint, R. 92; Testimony of Leuck, R. 32, 48.)

On April 8, 1938, the Interstate Commerce Commission referred the application for certificate of public convenience and necessity to Examiner A. F. Borroughs for further hearing which was held on May 4, 1938, the issue in question being the interruption of service which had taken place subsequent to the bankruptcy. (R. 25.) All the evidence at the hearing was offered by the applicant although certain protestants were present and cross examined witnesses. (R. 25-50.)

June 29, 1938, the Examiner filed his report wherein he found that the interruption of service was not within the control of the applicant and recommended an order for the issuance of a certificate of public convenience and necessity. (R. 51-58.) On November 14, 1938, Division 5 of the Interstate Commerce Commission found that the interruption of service over which applicant had control within the meaning of Sections 206(a) and 209(a) of Part II, Interstate Commerce Act, Commissioner Lee dissenting.

December 12, 1939, upon review by the full Commission the report of Division 5 was sustained, Commissioners Lee, Porter, Caskie, Alldredge and Splawn dissenting.

On June 7, 1940, The Gregg Cartage & Storage Company filed its complaint appealing from the Order of the Interstate Commerce Commission to the United States District Court for the Northern District of Ohio, Eastern Division. On September 20, 1940, the Northeastern Transportation Company, the successor in interest of The Gregg Cartage & Storage Company, filed its intervening complaint in the United States District Court. On May 19, 1941, the complaint of The Gregg Cartage & Storage Company and the intervening complaint of the Northeastern Transportation Company was dismissed by Judges Allen, Jones and Wilkin after a hearing was had on January 29, 1941. The petition of appeal of The Gregg Cartage & Storage Company and the Northeastern Transportation Company to this Court was filed on July 14, 1941. This Court noted probable jurisdiction on October 13, 1941.

SPECIFICATION OF ERRORS TO BE URGED.

The District Court erred:

1. In entering a decree affirming the order of the Interstate Commerce Commission.

2. In holding that the Commission, upon the facts, acted in accordance with the law in issuing its order denying plaintiff's application for a certificate as an interstate motor carrier under the Grandfather's Clause of the Motor Carrier Act of 1935.

3. In holding, upon the facts, that approximately 175 claims for personal injury and property damage during the year ending December 31, 1936, were evidence of poor business management and were within the control of this plaintiff, the Gregg Cartage & Storage Company, under Section 206 of the Motor Carrier Act of 1935. (U. S. C. Title 29, Section 306.).

4. In holding that, upon the facts found by the Commission's report of June 29, 1938 (Examiner A. F. Borrough's report) that the bankruptcy was within the control of the bankrupt as the word "control" is used in Sections 206A and 209A (U. S. C. Title 29, Sections 306A and 309A) of (fol. 149) the act and that the bankrupt is responsible in law for the consequences that flow from the adjudication.

5. In holding that the so-called "Grandfather" provisos of Sections 206A and 209A of the Motor Carrier Act (U. S. C. Title 29, Sections 306A and 309A) which were the provisions of the Act upon which the plaintiff's, the Gregg Cartage & Storage Company, applications for operating rights as a carrier were based, require continuous operation until the grant of the applications.

6. In holding that the interruption of services in the operations of the plaintiff, the Gregg Cartage & Storage Company, was an interruption of services over which the company had control within the meaning of Sections 206A

and 209A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Sections 306A and 309A).

7. In holding that Section 212A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Section 312A) applies only to a carrier whose application for operating rights has been granted and does not apply to one whose application is pending before the Commission.

8. In holding that the Commission's order was supported by evidence.

9. In holding that the Commission's construction of the pertinent provisions of the Act is correct.

10. In holding that the discrimination created under Section 212A of the Act (U. S. C. Title 29, Section 312A) is constitutional.

11. In holding that the Commission had not exceeded its discretion in that it went beyond the mere fact of bankruptcy and upon exhaustive hearing determined that the bankruptcy was not due to any failure on the part of the applicant and then decided arbitrarily and against the evidence and upon strictly legalistic grounds that any bankruptcy under the Motor Carrier Act will be held to be the result of bad business management.

12. In overruling the plaintiffs' and interveners' application for conclusions of law.

13. In that as to each special finding of fact the record does not disclose substantial, competent evidence to support said finding.

14. In granting the application for findings of fact and conclusions of law submitted by the defendants, the United States of America and the Interstate Commerce Commission.

15. In affirming that part of the Interstate Commerce Commission's report wherein the said Commission refused

or failed to make a finding as to the time when the "grandfather" rights expired.

16. In finding that the Commission acted in accordance with the law in failing to act upon the application for substitution filed on behalf of the Northeastern Transportation Company and finding that the continued interruption of service was due to the applicant, the Gregg Cartage & Storage Company.

SUMMARY OF ARGUMENT.

I.

The decision of the Commission and the decision of the District Court upholding that decision are both contrary to the facts of record. Since the Commission held a hearing on the question of interruption of service, it was bound to decide according to the evidence. It has failed to do so here, and the decision is, accordingly, contrary to the evidence and should be set aside as an order entered in plain disregard of, and contrary to the facts, of no legal effect.

II.

The Commission by its decision of this case has interpreted Section 212-A of Part II of the Interstate Commerce Act (49 U. S. C. 312-A) in such a way that there has been a discriminatory, and hence unconstitutional, construction of the Act. The Commission has divided applicants for "grandfather" rights into two classes. In its application of this Statute, the first group are those applicants who had their applications acted upon. These applicants are entitled to receive the thirty day notice. The second group are those whose applications were filed seasonably but who have not as yet had their application acted upon and who the Commission has ruled are not entitled to receive the thirty day notice. This affects a discrimination in favor of the one group which is unwarranted and unconstitutional.

III.

The Commission and the Court below have erroneously construed Section 206-A of Part II of the Interstate Commerce Act (49 U. S. C. 306-A) as requiring continuous operation by an applicant for a certificate of convenience and necessity under the "grandfather" clause from the date of June 1, 1935 until the date of action by the Commission on the application. That section of the Act should be construed as requiring operation only from June 1, 1935 to the effective date of the Act.

IV.

The Commission and the Court below should have decided when the alleged expiration of "grandfather" rights took place. The determination of when the "grandfather" rights expired is an essential part of the reasoning process by which it was determined that the rights had expired. To find merely that the rights had expired without stating when is arbitrary.

V.

The facts disclose that the appellants had no control over the causes of the bankruptcy, therefore no control over the interruption of service which occurred after the bankruptcy. After the adjudication of bankruptcy had been entered and the bankruptcy referee took charge, the appellants had no control over the receiver's failure to operate because the receiver, and the Bankruptcy Court, had exclusive control over the bankrupt's affairs; its officers and stockholders had none. The interruption of service was actually due to the action of the Interstate Commerce Commission which refused to act upon the various applications before it.

VI.

In reaching this decision, the Commission erroneously construed the provision of the bankruptcy law and so interpreted that law as to result in a defeat of its primary objectives and purposes as those objectives and purposes have been stated by this Court. The decision with reference to the questions of bankruptcy law involved is based upon doubtful authority and upon the case of *Central Trust Company v. Chicago Auditorium Association*, 240 U. S. 581, which has been superseded by an Amendment to the Bankruptcy Act (Section 70-B), and should, therefore, be overruled by this Court.

VII.

The decision of the Commission is arbitrary and discriminatory as applied to the appellants here because it fails to accord to the appellants the benefit of prior decisions which have held that other applicants, similarly circumstanced, were, nevertheless, entitled to a certificate of public convenience and necessity because the interruption of service was not within the control of those other applicants. In those other cases, questions of financial difficulties, attempt to abandon operations, action by the Commission or its representative, and involuntary bankruptcy were all involved.

ARGUMENT.

POINT I.

THE RECORD DOES NOT DISCLOSE A RATIONAL BASIS FOR THE CONCLUSIONS APPROVED BY THE COMMISSION.

This part of the Brief is devoted to demonstrating that the record in the case does not justify or support the conclusions reached by the Commission. The fact that this part of the Brief is being written is perhaps due to an excess of caution, since it would appear that this is no longer in dispute. The Government will very likely take the position that the support depended upon in the record derives from the fact that the record shows suspension of operations was incident to bankruptcy. Or to state it in the language used by the District Court, its position is defined as follows:

> "The Commission, however, declined to look beyond the bankruptcy. It held bankruptcy to be a matter within the control of the applicant without considering the causes of bankruptcy. Such a ruling by the Commission is the adoption of a proper administrative policy or the application of a rule of law, and in either case it seems to be a proper exercise of its authority and not subject to change by this court." (R. 99.)

The administrative policy approved in the above Memorandum Opinion, if it may be properly designated as such, had not been adopted by the Commission prior to the instant case. At any rate it was not applied to this case until after testimony had been taken looking beyond the bankruptcy and the Commission, through its Examiner, had determined that the bankruptcy was not within the control of the appellant to prevent. An examination of cases which have arisen since discloses that during its subsequent existence contradictions and uncertainties characterize its application to such a degree that it can hardly be considered as actually being a rule or policy. These cases have been collected and are submitted to the Court in Appendix B.

The bankruptcy of the appellant occurred while its application under the "Grandfather's Clause" was pending. There was a brief suspension of operations due to the bankruptcy. As a result of the receipt of protests based upon this suspension, the "Grandfather" proceeding was reopened and an Examiner dispatched to Cleveland to take testimony.

The hearing was held on May 4, 1938 before Examiner A. F. Borroughs. Before any testimony was presented the Examiner ruled as follows (R. 25):

> "The order of the Commission doesn't designate specifically what the issues are, as you know, counsel. However, it is the Examiner's understanding, and he now rules, that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of a receiver of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding, you may proceed."

The testimony of witnesses was then received and an extensive hearing conducted. (R. 25-50.)

Had there been in effect at the time of the above hearing some administrative rule or policy similar to the one now being urged, there would have been no point in holding a hearing at all. The public records of the United States District Court and the State Court of Cuyahoga County, Ohio, would have disclosed on examination that bankruptcy had taken place and that the Federal Receiver had not been authorized to operate the business. Had the so-called rule then been applied to the above facts, a finding would have resulted to the effect that the suspension was within the control of the appellants to prevent.

Since a hearing was held and testimony taken which constitutes all of the evidence in the Record on the question

of control, we feel justified in briefly calling attention to the evidence submitted.

In the first place none of the protestants offered any evidence.

The evidence throughout the hearing uniformly and consistently supports the inference that suspension of operations was beyond the control of the appellant to prevent. This was the finding of the Examiner who conducted the hearing. (R. 51.) It was the only finding that reasonable minds could arrive at from the evidence. We strongly urge that an administrative policy which can be utilized by an Administrative Board for the purpose of disregarding entirely the evidence in the case should not be sustained. In this case there was no conflicting evidence to weigh. Had the protestants been in possession of any evidence of probative force, we assume it would have been offered. The injustice of this form of procedure is aptly described in the dissenting opinion of Commissioners Alldredge and Splawn.

> "The finding of the majority that such interruptions are within the carriers' control is effected through employment of a legal fiction, based upon the rule expressed by division 5 as follows:
>
> And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent.
>
> I doubt the wisdom of our adopting this legalistic rule for application in cases of this kind. It seems to me that we should look behind the cold facts of bankruptcy in order to learn the true facts surrounding an interruption of a carrier's operations by operation of the bankruptcy laws. Where, as appears in this case, the receivers have acted with diligence to preserve the bankrupt's estate, the bankrupt carrier could not in fact have reasonably avoided its misfor-

tunes, and we have failed to cooperate with one of the receivers and a company which was ready and anxious to take over and operate the business by refusing to consider and permit the transfer of whatever rights existed at the time of sale, I cannot subscribe to a decision which wipes out all operating rights in existence at the time bankruptcy occurred." (R. 81.)

In a prior dissenting opinion by Commissioner Lee, while the matter was pending in Division 5 of the Commission, the following statement appears:

"There is no evidence of mismanagement or other dereliction on the part of applicant." (R. 65.)

This statement still stands unchallenged.

In a fairly recent case the precise question involved here was being considered. It was the case of *Rochester Telephone Corporation vs. United States*, 307 U. S. 123. The Court's opinion in part reads as follows (page 146): "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The summary of facts on page 144 reveals that considerable evidence was introduced. The issue of fact was control of one corporation by another. The evidence was conflicting. One contention very strongly urged was that ownership of only one-third (⅓) of the stock by the alleged controlling company showed conclusively absence of control. This fact had been weighed against other circumstances, including a voting trust agreement. At any rate it is clear that the record provided a rational basis for the conclusions reached.

The opinion in this case refers to two other cases which discuss the question of judicial review of administrative determinations.

In *Swayne & Hoyt vs. United States*, 300 U. S. 297, the matter of steamship rates was under consideration. In reading the opinion, one finds on page 300 the following:

"Thereupon the Secretary * * * made an order suspending the schedules and directing a second hearing * * *. On this hearing new evidence was introduced and relevant portions of the evidence adduced on the previous hearing were spread upon the record."

The view of the Court as expressed in the syllabus is as follows:

> "Page 5—Syllabus. A determination by an administrative Agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders, will not be set aside by the Courts if there is evidence to support it, even though upon a consideration of all the evidence the Court might reach a different conclusion."

It is apparent that it was a case in which the record supplied a rational basis for the conclusions reached.

The other case is *Mississippi Valley Barge Line Company vs. United States*, 292 U. S. 282. A controversy had arisen between land and water carriers regarding competitive rates. "There were full hearings of the parties in interest with testimony and argument." (Opinion, page 285.) "In this instance the care and patience with which the Commission fulfilled its appointed task are plain even to the casual reader upon the face of its report." (Opinion, page 287.)

It was held that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the Interstate Commission.

Once again it appears to be a case in which the record supplied a rational basis.

This Court once said that "only questions affecting constitutional power, statutory authority and the basic prerequisites of proof" can be raised in a case of this kind.

Is there not a clear violation of basic evidentiary requirements involved in a conclusion that disregards a rec-

ord which supports only one finding and that opposite to the one reached?

Should there not be some question as to whether authority exists for the Commission to invade a field in which the Courts move with exceeding care, by establishing a presumption and in addition making it conclusive. The legal fiction, administrative rule or presumption utilized here, is in addition to those the law has previously recognized and this despite a record that consistently refutes it from beginning to end.

The Courts will not define presumptions in such manner as to imply superiority over established facts. Where facts appear presumptions recede. *Clement v. Packer*, 125 U. S. 309; *Lincoln v. French*, 105 U. S. 614; *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881, 56 A. L. R. 317.

A fair analogy would be that of a Court of Equity calling a jury to pass upon an issue of fact and then disregarding the verdict and the evidence by invoking a presumption hitherto unknown to the law and upon that basis overruling the jury.

Concluding on this point, may we again point out that there is no showing in the record of mismanagement, of a high accident rate or any defect whatsoever in any manner in which the company conducted its business. (Page 54, Record.) The Insurance Company causing the receivership was on the approved list of the Interstate Commerce Commission and the policy was on file with the Commission. A fair analysis of the facts shows, therefore, that the result reached by the Commission could be obtained only by completely disregarding the evidence in the case and relying upon a legalistic rule which has no rational relation to the evidence.

POINT II.

THE ACT OF THE COMMISSION IN WITHHOLDING FROM THE APPELLANT BENEFITS UNDER SECTION 212A, PART II, INTERSTATE COMMERCE ACT (49 U. S. C. SEC. 312A) WAS ARBITRARY, DISCRIMINATORY AND UNCONSTITUTIONAL.

On October 14, 1937 the Receiver of The Gregg Cartage & Storage Company filed a petition with the Commission praying for authority to suspend operations without prejudice to its operating rights under the "grandfather" clauses of the Act. At that time Section 212-A, of Part II of the Interstate Commerce Act, in its material portion, provided as follows:

> "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until terminated as herein provided. Any such certificate, permits, or license may, * * * upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provisions of this part (chapter), or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than ninety (90) days, to be fixed by the Commission, with a lawful order of the Commission, * * * or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit or license found by the Commission to have been violated by such holder."

Later this Section was re-enacted to provide for thirty days' notice instead of ninety days' notice.

The refusal of the Commission to apply this Statute to the applicant appears upon examination to have been arbitrary, discriminatory and unconstitutional.

The Commission has divided applicants for "grandfather" rights into two classes in its application of Section 212-A. The first group are those whose applications have been acted upon. They are entitled to receive the thirty day notice. The second group are those whose applications were filed seasonably, but have not as yet been acted upon and who, the Commission has ruled, are not entitled to receive the thirty day notice. The dissenting opinion of Commissioner Lee takes sharp issue with this discriminating procedure.

> "Congress foresaw the impossibility of an immediate determination of all 'grandfather' applications and, to care for this situation, provided in section 206(a) that applicants for 'grandfather' certificates might continue their operations until their applications had been determined. The right thus given to continue their operations is subject to no restriction, and I do not believe that Congress intended that 'grandfather' rights during such period should be any more liable to termination because of these temporary interruptions in operations than are such rights after the issuance of a certificate." (Dissenting Opinion of Commissioner Lee, R. 69.)

Congress provided for continued operations while the application was pending in the following manner:

> "Title 49—Section 306 U. S. C. Pending the determination of any such application the continuance of such operation shall be lawful."

Thousands of applications for "grandfather" certificates were filed with the Commission. On November 14, 1938, three years after the Statute was enacted, many of the applications were still undetermined. (R. 68.)

On December 12, 1939, the Commission had been unable to pass upon all of the nearly ninety thousand "grandfather" applications filed with it. (R. 78.)

It has therefore come about that the consequences of interruption of service differ in the two classes. The Com-

mission has recognized the injustice and inequality involved in this situation and is hopeful that this regrettable situation will pass away when all of the "grandfather" applications have been disposed of. It expresses satisfaction that only a few cases of unjust consequences have come to its attention. (R. 79.)

The dissenting opinion of Commissioners Lee, Porter and Caskie views the matter somewhat differently:

> "An interpretation which results in such inequities should be indulged only where unavoidable, which is not the case here. As stated by the majority, it is a well-recognized principle of statutory construction that a statute will be presumed to speak as of the date of its taking effect, unless a contrary intention appears therein, but it is concluded that the fact that the act contemplates that some of its sections may become effective on different dates evidences a contrary intention. I do not think so. There is nothing illogical in interpreting the act as speaking, as to its several sections, as of the respective dates such sections became effective, and such an interpretation would result in no confusion. So interpreted, the words 'was in bona fide operation * * * on June 1, 1935, * * * and has so operated since that date,' in the 'grandfather' clause of section 206(a), would mean operation from June 1, 1935, to October 15 of that year. Under such interpretation all 'grandfather' applicants would receive equal treatment. In order to secure a certificate, each would have to show operations over the same period, and there would be no disparity as to termination of operating rights by reason of interruptions in operations." (R. 80.)

The dissenting opinion of Commissioners Alldredge and Splawn (R. 80) recognizes the fact that the majority decision will wipe out the operating rights of a large number of motor carriers who have had the misfortune to become bankrupt during the long period since June 1, 1935.

The discrimination complained of operates two ways. It favors those who have been fortunate enough to have

their application considered by making available to them the thirty day notice. It favors them again by requiring a showing of continuous operation for a less period, frequently several years, than what was required of those whose applications are still pending.

It is difficult for a fair-minded person to be convinced that the Commission has no alternative except to adopt a harsh and arbitrary rule which results in the degree of discrimination herein described.

POINT III.

IT IS ERROR TO CONSTRUE SECTIONS 206A AND 209A OF PART II OF THE INTERSTATE COMMERCE ACT AS REQUIRING CONTINUOUS OPERATION FROM JUNE 1, 1935, TO THE DATE OF THE GRANT OF THE APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

A.

The construction of the Act by the Interstate Commerce Commission and District Court is contrary to the principle that the intent will be gathered from the words used.

The pertinent parts of Section 206A for the purpose of this point are as follows:

"* * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time except in either instance as to interruptions over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings * * *"

if application is made within a certain time. (Appendix, *post* p. 54.)

The Commission and the court below have held that this section requires that an applicant for a certificate (or if a contract carrier for a permit under Section 209(a)) must have been in continuous operation from June 1, 1935, until the time of the issuance of the certificate. The specific question involved is whether or not "since that time" means that the service must be continuous.

There is no warrant in the statute for interpreting "and has so operated since that time" as requiring continuous operation.

This Court has recently stated the prevailing doctrine concerning construction of statutes in *United States v. American Trucking Association*, 310 U. S. 534. Speaking through Mr. Justice Reed the Court stated that the function of the courts was easily stated and that function "* * * is to construe the language so as to give effect to the intent of Congress." (p. 542.) Continuing the Court said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." *Taft v. Commissioner of Internal Revenue*, 304 U. S. 351, 359; *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89; *Wilbur v. United States*, 284 U. S. 231, 237; *Crooks v. Harrelson*, 282 U. S. 55, 60; *United States v. Missouri P. R. Co.*, 278 U. S. 269, 278; *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 253; *Caminetti v. United States*, 242 U. S. 470, 490; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 199.

It takes a great deal of ingenuity to read "continuous" or "continuously" into the phrase since that time when it is considered that those words were expressly eliminated

by the Congress in drafting the legislation. In explaining the statute to the Senate, Mr. Wheeler, Chairman of the Interstate Commerce Committee of the Senate, said in explaining the meaning of Section 206:

> "In lines 6 and 8, page 23, the words 'continuously' and 'continuous' have been omitted in view of the objection that operators who have temporarily ceased operations for reasons beyond their control may be deprived of the benefits of the grandfather clause." 79 Cong. Rec., Part 5, p. 5654.

We submit that words which have been deliberately omitted are just as persuasive of the meaning of a statute as are the words which have been used, and that no regulating body has authority to read the words into the statute when they have been stricken out by the legislature.

B.

The construction of the statute adopted here ignores the rule that a statute speaks as of the date of its taking effect.

The Commission has construed the statute as requiring continuous operation from June 1, 1935, to the date of the granting of the permit.

The Commission stated that the rule requiring a statute to be construed as speaking from its effective date was "well recognized" but that since the Motor Carrier Act contemplated that different sections of the Act take effect on separate dates, a contrary intent was indicated by the Congress. To decide otherwise, so the Commission holds, is required in order to avoid absurd or futile results, and in reliance upon this construction the Commission cites *McDonald v. Thompson*, 305 U. S. 263; *Welch v. New Hampshire*, 306 U. S. 79; *Eichholz v. Missouri Public Service Commission*, 306 U. S. 268. These cases, so the Commission says, have clearly announced "the underlying principles that our actual action rather than the grant"

of the statutory power to take the action is the determinative factor in proceedings under the Motor Carrier Act * * * ." (R. 78.)

The above cited cases do not require such a construction, nor do they support the contention of the Commission, as the questions there decided are not the ones in this case. *McDonald v. Thompson* is authority for the proposition that where a carrier has operated in violation or defiance of state laws, he has not been in "bona fide" operation, and, therefore, is not entitled to the exemption granted by the proviso in Section 206(a). In order that nothing more might be read into that case this Court specifically said that it was not considering any other question presented.

H. B. Welch Co. v. New Hampshire, 306 U. S. 79, merely held that this Court would not construe Section 204(a) of the Motor Carrier Act as indicating that Congress intended that state regulatory measures which regulated traffic and safety on state highways should be superseded by regulations of the Interstate Commerce Commission prior to the effective date of said regulations. In other words, the court held the mere grant of the power to regulate would not supersede the state regulations, and that such regulations would not be superseded until the Commission had actually issued the regulations. That case, however, is no authority for the proposition advanced by the Commission.

Eicholz v. Missouri Public Service Commission, 306 U. S. 268 like *Welch v. New Hampshire, supra*, was not concerned with the effective date of the statute. The question there was whether or not upon application to the Interstate Commerce Commission for certificate of public convenience and necessity, and during the pendency of that application, the State Public Service Commission was deprived of jurisdiction over intrastate traffic carried by the applicant. The decision of this Court was that the filing of the application before the Interstate Commerce Commis-

sion did not deprive the state body of its jurisdiction, a decision which few would quarrel over, but which has no application to the question herein considered.

This Court has consistently held that statutes shall be construed prospectively and this holding has always been in emphatic language. The most recent expression on the subject is found in *Hassett v. Welch*, 303 U. S. 303, where at p. 314 through Mr. Justice Roberts the court said:

> "* * * a law is presumed, in the absence of clear expression to the contrary, to operate prospectively"

citing *United States v. Heth*, 3 Cranch 399, 413; *Reynolds v. McArthur*, 2 Pet. 417, 434; *Shurat v. Doyle*, 258 U. S. 529; *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 162.

There is no clear expression to the contrary in this statute nor would the construction involve absurd or futile results. It would, as is set forth elsewhere, result in a construction which would place each applicant on an equal basis and should have been adopted.

POINT IV.

THE COMMISSION SHOULD HAVE MADE A FINDING AS TO THE TIME WHEN THE RIGHTS EXPIRED.

The Commission held that it was useless to "speculate upon the question whether the 'grandfather' right expired before or after the sale." (R. 75.) This, we submit, is a failure to make a most important finding. Determining the time is not speculation, it is an integral part of the mental process of forming the judgment that the rights had expired.

The Commission if it reached the conclusion it did by actually considering all of the elements involved, it must have, somewhere in its process of reasoning, reached a point where it knew the rights expired. That they were once in existence cannot be denied. The Commission holds

that the rights expired and if this is true, then somewhere in the record in this case an event took place which, when considered in conjunction with the statute, caused the rights to cease to exist. That event must have been known to the Commission or else it could never have reached the conclusion it did and if it knew what the event was, the Commission also knew when the event happened.

Failure to state when the event occurred makes a fatal break in the Commission's chain of reasoning; it suggests an arbitrary finding to support the decision the Commission had determined to reach.

POINT V.

THE INTERRUPTION OF SERVICES WAS NOT WITHIN THE CONTROL OF THE APPLICANT.

A.

The causes of the bankruptcy were not within the control of the applicant.

The report of Division 5 of the Commission, the report of the full Commission on reargument, and the decision of the court rest upon two fundamental misconceptions. The first of these is that the insolvency and resulting bankruptcy were caused either by overt acts of The Gregg Cartage & Storage Company or by its failure to prevent the happening of certain events because of failure to act in accordance with sound business judgment. Neither point of view finds support in the record.

The report of Division 5 states unequivocally that on June 30, 1937, just three months prior to the application in the state court for the appointment of a receiver to continue the operation of the business that the company was solvent. (R. 63.) Division 5 then finds that at the time the receiver was appointed by the bankruptcy court and took charge, that is on October 30, 1937, the applicant clearly was insolvent. (R. 63.) For a going concern to

pass from solvency to insolvency in three months' time requires an explanation. It does not just happen. There must be a cause or causes and the determination of the cause or causes solves the question as to whether or not the insolvency was within the control of the insolvent.

There was no change in management. The president and active head of the corporation was the same man who had brought the business from a one-truck operation in 1920 to one which did a yearly business of $2,000,000.00 in the year prior to the insolvency. There is no showing in the record that there was any diminution in the amount of freight. There is no evidence of any sudden great increase of competition with resultant loss of business to competitors. There was no defalcation by employees. No sudden economic depression which unfavorably affects all members of the business world supervened. In fact this insolvency took place in 1937 which was the most prosperous year of the last decade. It is thus seen that none of the usual causes of financial difficulties were present, and no facts were produced by protestants at either hearing to show dereliction or bad judgment on the part of the management. In view of the fact that the Commission and the courts must act upon the records which are developed before them because they have no other method of obtaining information on which they may rely, it follows that the facts developed on the record by the applicant's testimony are the only facts upon which a decision may be made as to whether or not the insolvency was caused by the acts of omission of the insolvent or whether it was caused by other factors. Repeated decisions of this Court forbid speculation as to what facts might have been adduced; the decision must rest on record facts.

Counsel believe that they have fully stated in narrative form the gist of the testimony given at the hearing before Examiner Borroughs, this being the hearing which was held after the insolvency. This is set forth in the Statement. (*Ante*, pp. 3 to 7.)

It discloses that The Gregg Cartage & Storage Company carried insurance with three different companies, such insurance being carried in the exercise of sound business judgment and in conformity with the requirements of the regulating bodies having jurisdiction over the business conduct of the carrier. That insurance was carried for the purpose of protecting the Gregg Company from the legal liability flowing from claims which, perforce, arise from time to time in the conduct of motor carrier operations. It is common knowledge that it is impossible to engage in continuous operation of motor vehicles upon the public highways without eventually having a certain number of accidents. To repeat, the insurance was carried for the purpose of eliminating or mitigating the legal liability flowing from such actions. All of the policies carried by The Gregg Cartage & Storage Company were carried with companies which were approved by the Public Utilities Board and the Interstate Commerce Commission, the latter being a regulating body which this Court has repeatedly characterized as "a permanent expert body." (*Board of Trade of Kansas City, et al. vs. United States, et al.*, decided January 5, 1942, O. T. 1941, No. 143.) Carrying insurance in a company approved by such a body would be the exercise of a sound business judgment; indeed, the insurance company must be one approved by the Interstate Commerce Commission. One of the companies, The Central Mutual Insurance Company, however, went bankrupt. Prior to the time it went bankrupt it neglected or failed either to disprove or to settle claims against the Gregg Company; claims which the Gregg Company had every right to expect the insurance company to disprove or settle. The record discloses that as soon as the Gregg Company realized that this company was fast nearing insolvency it canceled its insurance policy with The Central Mutual Insurance Company and placed its insurance with another approved company. The Gregg Company wasted no time

in bemoaning its misfortune because of the number of unsettled claims which it inherited from Central Mutual's insolvency. It immediately turned over its entire file covering these claims to its attorneys who, according to the testimony, applied themselves with great assiduity to working out some mode of settlement of the claims. Certainly their efforts were not all in vain because for the first six months of 1937 the company was able to continue in operation and remain solvent.

The claims which the Central Mutual should have disposed of were not the only insurance troubles which the Gregg Company had. Insurance which it had placed with the Sun Insurance Company and the Monarch Insurance Company, both strong companies and still in operation, had failed to provide the protection which the company thought it had purchased by payment of premiums. Claims were filed against the Gregg Company, and the Sun and Monarch Insurance Companies, relying upon technicalities, refused to pay the claims. The claimants, customers of the Gregg Company, clamored for payment and, relying upon the financial soundness of the insurance companies, the Gregg Company paid some $30,000.00 worth of these claims, intending to force reimbursement from the insurance companies because of their refusal to pay, based upon bare technicalities. No one with business experience will dispute that the payment of these claims, even in such large sums, was in the exercise of a sound business judgment. No motor carrier can long remain in business who is engaged in constant altercation with shippers over the payment of claims where such claims are just and where refusals to pay them are based upon mere technicalities.

As stated above no other explanation of the insolvency is disclosed by the record. If protestants knew of any such evidence, it is difficult to believe they would not have produced it. While the cross examination which was made of witnesses was openly hostile, the cross examination failed

to disclose any lack of business judgment on the part of the Gregg Company. It is, therefore, submitted that any attempt to prove that the insolvency and the bankruptcy were caused by any acts or omissions by the Gregg Cartage & Storage Company fails, nor is it possible to charge the company even with mere mistake in judgment in applying for an operating receivership in the state court. The purpose in so applying is plainly set forth in the testimony of Mr. Leuck, which was to place the affairs of the company in the hands of a receiver who would continue operations, and at the same time, the company being under the supervision of the court, a stay of legal proceedings could be secured, except those which the court would permit. Thus, the company would be able to continue its efforts to settle the many claims which were being pressed for payment. Operation of the business and a temporary cessation of litigation were essential to the continued existence of the company. The state receivership would have established both. The Gregg Company had the bankruptcy forced upon it over its "strenuous protest." (R. 37.)

B.

Events Subsequent to the Appointment of the State Receiver Were Not Within the Control of The Gregg Cartage & Storage Company in Any Sense.

The report of Division 5, the report of the whole Commission and the judgment of the court reveal a continuing misconception on the part of those responsible for each decision. This misconception rests upon the seeming assumption that after the appointment of both the state and bankruptcy receiver the Gregg Cartage & Storage Company was in control of the company and could decide whether or not operations should continue. This, of course, is entirely erroneous. Division 5 at page 64 of the record states as follows:

"In our opinion the discontinuance of operation by applicant due to its insolvency and resulting in voluntary bankruptcy is not the kind of interruption in service within the meaning of the exception."

(The applicant never discontinued operation. It was in operation on the day the state receiver was appointed and its operations were continued by the state receiver until the bankruptcy receiver took over.)

"Prior to such bankruptcy it had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims."

(No mention is made of the fact that this selection of insurance companies must have the approval of the Commission.)

"It is presumed to know that if it fails to conduct its business in such a way as to provide for its obligations incurred by operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the continuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of motor carrier which leads to the bankruptcy. It is clear that all the 'acts of bankruptcy' enumerated in the Bankruptcy Act as grounds for a petition in involuntary bankruptcy are so framed as to describe a voluntary action. And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent."

(Bankruptcy proceedings are not always the natural consequence of the voluntary acts and business methods and Division 5 so recognizes when it says "that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or misconduct.")

With reference to the discontinuance of operations after the bankruptcy, Division 5 said also on page 64:

"In the instant case, the federal court receiver made no attempt to continue the motor carrier operations of applicant. While he apparently did not have such authority under the order appointing him, the law is well settled that he could have requested a grant of such authority. He did not do so, however, and devoted his efforts to preserving and liquidating applicant's assets for the benefit of creditors. Consequently, so far as this record shows there is no indication that he desired to continue the applicant's former motor carrier operations in whole or in part. Rather, it appears from his acts that he had no intention of continuing motor carrier operations so as to preserve any operating rights which the bankrupt estate might have had under the Act, and that he intended to abandon all such operations."

The full Commission stated as follows (R. 75):

"The attempted sale, of course, was ineffective without our approval and in no wise impaired the legal ability of the receiver to continue the operations until that approval was obtained. Hence the breach in the continuity of operations is to be ascribed to the bankruptcy for the period after as well as before the sale. Our holding in abeyance the application for approval had no significance or effect upon the crucial fact that no operations of any kind have been conducted from the time the receiver in bankruptcy took charge, and it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale.

"While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished."

But the acts of the bankruptcy receiver are not those of the bankrupt. The bankrupt in this case had lost con-

trol of its affairs when the state receiver was appointed, a month before the bankruptcy receiver was appointed.

It is needless to extend the length of this brief by a long discussion of the rights, powers and liabilities of receivers and of the powers and jurisdiction of bankruptcy courts, but a brief review of the holdings of this Court will serve to demonstrate the errors of the Commission and the court below.

As to the powers over administration of bankrupt estates this Court recently said through Mr. Justice Black in *Thompson v. Magnolia Petroleum Company*, 309 U. S. 478 at 483:

> "A Court of Bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession."

citing *Isaac v. Hobbs Tie & Timber Company*, 282 U. S. 734, wherein Mr. Justice Roberts upon the authority of *U. S. Fidelity & G. Co. v. Bray*, 225 U. S. 205, said at page 739:

> "Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

Again as to the exclusive power of the bankruptcy court, this Court recently held that in reorganization proceedings under Section 77B that upon the attaching of the court's jurisdiction the stockholders cease to have any power over the management of affairs. In *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, one of the contentions made by stockholders in support of the plan of reorganization was that their major contribution to the reorganization which would justify their inclusion in the plan was "the waiver of their right to defer or put off foreclosure until 1944, i.e., to remain in possession . . . ." But this contention the court stated, by Mr. Justice Douglas, "does not stand analysis." Continuing he said:

"The right to remain in unmolested dominion and control over the property was necessarily waived or abandoned on invoking the jurisdiction of the Federal Courts in these proceedings. *When that jurisdiction attached, the court rather than the stockholders was in control*, with all of the powers and duties which that entailed under Sec. 77B." (Italics supplied.) 308 U. S., 127.

The receiver was in no wise under the control of the bankrupt; but he was in control of the affairs of the bankrupt and yet that control was limited. A receiver is the fiduciary agent of the court with limited powers which are defined by the order of his appointment. *Matter of Singer Furniture Corporation*, 47 F. (2d) 780; *Matter of Metropolitan Motor Car Co.*, 225 F. 274. The extent of his authority is always measured by the order of appointment, the statute and subsequent direction from the court. *Matter of Harley*, 10 Am. B. R. (N. S.) 687. Custody of the property by the receiver calls for an attendant duty on his part to protect it until delivery of actual possession to the trustee when one is appointed.

"More is required than honesty; a receiver is a fiduciary; he undertakes to care for the property and manage it for the creditors, to act with assiduity and with reasonable competence."—per L. Hand, *J.*, in *Matter of Piece Dyeing Co., Inc.*, 89 F. (2d) 37, 40.

The receiver or trustee is not empowered merely by virtue of his appointment to conduct the business of the bankrupt. *Matter of Wiener*, 7 F. Supp. 691, aff'd. (C. C. A. 3) 72 F. (2d) 1010.

The ordinary duties of a receiver or trustee in bankruptcy are to collect, preserve and liquidate the assets of the estate, *Imperial Assurance Co. v. Livingston* (C. C. A. 8), 49 F. (2d) 745; without specific authorization he has no power to make any expenditures for the operation of the business. Nor is he under any duty to apply for such authorization, irrespective of motive for failure to do so. *Matter of Wiener*, 7 F. Supp. 691.

Appointment of a receiver "with all the usual rights and powers thereof" does not authorize the receiver to continue the business. *Matter of Harley* (Ref. Cal.), 10 Am. B. R. (N. S.) 687. Power to continue the business is given by Clause 5 of Section 2(a) of the Bankruptcy Act which provides that courts of bankruptcy shall have jurisdiction:

> "to authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees if necessary in the best interest of the estate * * *"

Without such authorization the receiver had no power to continue the business. General Order XL as amended January 16, 1939, provides:

> "A receiver or marshal appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a mere custodian within the meaning of Section 48 of the Act, unless his duties and compensation are specifically enlarged by order of the court upon proper cause shown either at the time of appointment or later."

It is important in this discussion of bankruptcy to note that under Section 70(a) Par. 5 of the present Act (as amended by the Chandler Act and similar provisions of the prior acts) the right to the certificate would pass to the Trustee in bankruptcy. Much is made in the reports of Division 5 and the full Commission of the fact that the bankruptcy receiver failed to continue the operations of the bankrupt.

Under Section 2(a) 5 the court is definitely instructed in the class of cases in which it may authorize the continuance of operations and when considered along with other provisions of the Act encouraging prompt liquidation of the estate, the court is justified in continuing operations only when it is clear that benefit will result to the estate. Section 70, par. (b) of the present Act is a Chandler Act Amendment and provides that within sixty days after ad-

judication, the Trustee shall assume or reject any executory contract, including unexpired leases of real property. Apparently under this provision the lessor of real property will not know whether the trustee will assume the responsibility of the lease or reject it until sixty days after adjudication. In effect, any action is suspended during that period. This section merely enacts the existing law on the subject as developed by the courts, which was to the effect that the trustee had a reasonable time in which to resume or reject executory contract, e.g. *In Re United Cigar Stores*, 69 F. (2d) 513, 515. If the Commission's view is correct that the right to operate under the grandfather clause carries with it the obligation to operate, it would seem that the receiver or trustee would have at least sixy days in which to decide whether it was worth while to assume the responsibility that would go along with the privilege.

In view of the foregoing we respectfully submit that the interruption of service after the bankruptcy was not within the control of the bankrupt nor were the causes of the bankruptcy; in short, that neither mediately nor immediately was the bankrupt responsible for the failure to operate.

C.

The Interstate Commerce Commission was responsible for the continued interruption of operations.

Discussion of the question of control over interruption of service which occurred in this case requires an examination of the conduct of the Interstate Commerce Commission with respect to the various applications made to it.

The state receiver never suspended operations. (R. 28, 61.) On October 14, 1937, he petitioned the Commission for authority to suspend and six weeks later, November 30, 1937, this petition was denied on the ground of lack of authority. Meanwhile, the bankruptcy receiver had taken over, suspended operations and sold the rights to operate

to the intervener-appellant, Northeastern Transportation Company, the transfer being made on December 24, 1937. Application for approval of the transfer and substitution of Northeastern as applicant in the "grandfather" applications was made to the Commission on January 7, 1938, or excluding Sundays and holidays within ten days from the date of transfer. (Report of the Commission, R. 75.) The intervener according to its complaint (R. 92) "repeatedly requested the Interstate Commerce Commission to act upon the application for substitution in order that it might file tariff rates and operate in interstate commerce." The application was not disposed of until June 13, 1940 (R. 95), which was after the filing of the complaint in the District Court.

The reason why the Commission neglected or failed or refused to act upon the application is not shown by the record. As a usual thing such applications are disposed of within from one to two weeks.

Why, it might be asked, were not the wheels kept turning any way; why did not those who were interested operate at all costs? The answer is plain upon the record; instructions were issued by representatives of the Commission not to operate.

The following testimony was given by Howell Lenck when he was recalled for further examination by the examiner.

"Q. Well, who were the applicants that you refer to now in this case; I presume you refer to the Northeastern Transportation Company?

A. Yes, sir."

(fol. 76):

"Q. Would they be permitted to resume operations, in your opinion?

A. We took that up with the local official of the Interstate Commerce Commission and on his advice have not attempted to operate."

In its complaint the intervener-appellant says:

> "This intervener further says that what operations were started, preparatory to commencing business, were suspended at the urgent request of Roy M. Snetzer, District Director of Division 5 of the Interstate Commerce Commission, and his assistant, William Hubbard."

Morgan v. United States, 304 U. S. 1, held that "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." (p. 15.) Is the observance of these "rudimentary requirements of fair play" required of administrative bodies only in connection with a hearing? We believe not. To so confine the application of the principle is to invite abuse in one area while forbidding it in another.

The Commission, we submit, acted unfairly throughout the time that it had jurisdiction of the matter. It refused to act upon the application for substitution; it applied a hard and fast rule of law to a case where it was not warranted by the facts as disclosed after a full hearing; its representatives by their requests practically forbade operations. In one instance the Commission refused to take the necessary step to let the successor in interest know whether it could operate, on the other hand, through its representatives it requested that no operations be resumed until the Commission had acted upon the application. In short, the Commission by its course of conduct effectively controlled the situation to the extent that it directly influenced the decision of those in charge not to continue operations. Yet the Commission says the interruption of operations brought about a loss of rights because the interruption was within the control of appellants and the lower court decision upheld this view.

We think this was not fair play. We think it is an attempt on the part of the Commission to shift responsibility

for a regrettable situation from its own shoulders where it rightly belongs. Appellants are not alone in thinking that the Commission is responsible; Commissioners Alldredge and Splawn also thought so. (R. 81.)

POINT VI.

THE COMMISSION AND THE DISTRICT COURT ERRED IN DECIDING THE QUESTIONS OF BANKRUPTCY LAW INVOLVED.

A.

The decision destroys, instead of preserving, assets, which is one of the prime purposes of the Act.

The decisions of this Court dealing with the Bankruptcy Act have developed a settled doctrine concerning the purposes and the aims of the Act. The original purpose of the bankruptcy statute was simply to effect an equitable distribution of the bankrupt's property among his creditors. *Straton v. New*, 283 U. S. 318; *Kothe v. R. C. Taylor Trust*, 280 U. S. 224. What was formerly considered to be a secondary purpose to the main purpose set forth above, the discharge of the debtor from his obligations, is now recognized to be equally important with the original objective. *Central Trust Company v. Chicago Auditorium Association*, 240 U. S. 581. One of the purposes of the Bankruptcy Act was to bring about a speedy distribution of the bankrupt's assets, and this has been held to be second only in importance to securing equality of distribution (*Bailey v. Glover*, 21 Wall. 342), and in *Francis v. McNeal*, 228 U. S. 695, it was held that it was the purpose of the Bankruptcy Act so far as possible to preserve existing business relations and not to upset or interfere with fundamental incidents thereof.

The decision of the Commission which the court below upheld does violence to these notions of the purpose of the Bankruptcy Act. When a policy is adopted which can result in nothing but the destruction of the most valuable

asset, it is useless to speak of speedily and equally distributing the assets. This, however, is what the Commission with the sanction of the District Court has done.

A motor carrier has no more valuable asset than his primary asset which is the right to operate. He may have a fleet of the finest trucks, fully paid for, he may have ample cash in the bank and good credit lines, in addition, he may have a crew of expert drivers and handlers. If, however, he has not an operating right, he is in a worse position insofar as conducting a business and making profits is concerned, than is the carrier who owns but one truck and operates it himself. Yet this most valuable asset of a motor carrier is wiped out by the decision in this case whenever a motor carrier is either so unfortunate or improvident, it matters not which, to become bankrupt. The statement of the effect of the doctrine as viewed by Commissioner Lee in his dissent in the report of Division 5 follows:

> "If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers, whose applications therefor have not been determined, then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; it could not effect a composition or an arrangement with its creditors and resume operations; if a corporation, it could not be reorganized under the corporate reorganization provisions of the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable. I cannot believe that Congress so intended."

and Commissioner Alldredge in his dissent to the report of the Commission states, R. 80:

> "The effect of the conclusions reached by the majority will be to wipe out the operating rights of a large number of motor carriers who have had the misfortune to become bankrupt during the long period since June 1, 1935."

Such a result as this works great hardship on creditors; it perverts the purposes and objectives of the Bankruptcy Act, and should be rejected by this Court as being directly contrary to the spirit of decisions of this Court dealing with the subject.

B.

The decisions of the Commission and the District Court are based upon doubtful authority.

The Commission in reaching its decision "that voluntary and involuntary bankruptcy are within the control of the bankrupt and that he is responsible for the legal consequences that flow from the adjudication" admitted that it knew of no decision in support of its conclusion but thought it had found an analogy in *Central Trust Company v. Chicago Auditorium Asosciation*, 240 U. S. 581. (R. 74.) The district court held that "the rule or policy established by the Commission seems supported by the holding "in that case." (R. 101.)

We think that the case is not in point and that it is of very doubtful authority for reasons set forth below.

That case held that an adjudication of bankruptcy where the bankrupt was the promisor of an executory contract "is the equivalent of an anticipatory breach of an executory agreement." The reason that the court reached that decision is clearly set forth in the opinion and must be considered in order to get the true meaning of the decision and its applicability to other situations.

At pages 591 and 592 the court said:

> "Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract

that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams v. U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm v. Horst, supra.*"

The foregoing quotation clearly demonstrates that the decision is based upon a desire to determine the rights of bankrupt and creditor with reference to the objectives of the Act "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations." The language must be read with that view in mind and as limited by the facts of the case, *Bramwell v. U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 489; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 413.

When so considered we submit that the analogy fails. There are no executory contracts involved in this case. No creditor of the bankrupt is pressing for recognition of an anticipatory breach with consequent right in him to have his claim recognized.

The facts are so dissimilar as to afford no basis for applying the reasoning and the principle involved; and there is no warrant in the past decisions of this Court to determine the issues here, with their bearing upon administration of a regulating statute, upon principles evolved in a case primarily involving private rights.

C.

Central Trust Company v. Chicago Auditorium Association is in conflict with provisions of the Bankruptcy Act as amended and should be overruled.

Section 70(b) of the Bankruptcy Act as amended by the Act of June 22, 1938, provides in part that:

> "Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property * * *."

This is directly contrary to the doctrine of *Central Trust Co. v. Chicago Auditorium Association* that an adjudication of bankruptcy is the equivalent of an anticipatory breach of an executory agreement.

It requires no argument or citation of authority to demonstrate that if the trustee is allowed a period within which to assume or reject the contract, the adjudication cannot bring about a breach because if this were so there would be no contract for the trustee to assume or reject. The statute and the decision are mutually contradictory and the decision, of course, is superseded by the statute.

Appellants submit that the authority of the decision has been destroyed and it cannot form the basis of the decision in this case.

POINT VII.

THE COMMISSION IN ITS DECISION UPON THE QUESTION AS TO WHETHER OR NOT CESSATION OF OPERATIONS WAS WITHIN THE CONTROL OF THE APPLICANT HAS ACTED IN AN ARBITRARY AND UNJUST MANNER AND NOT IN ACCORD WITH ITS OWN PRIOR DECISIONS.

A review of the decisions of the Commission, in those cases which have required it to pass upon the question of whether or not the interruption of service had been within the control of the applicant, shows that it has been surprisingly inconsistent and discriminatory. Some of the more conspicuous examples of this action by the Commission are set forth below. In some cases, the Commission has rigidly applied a hard and fast rule. In other cases it has done just the opposite. In some cases the misfortunes of the applicant have appealed to the sympathies of the members of the Commission. In other cases, such as this, misfortune has been attributed to the applicant instead of being regarded as something which it had suffered.

In the instant case the Commission has said that the interruption of service, which was an interruption of only about six weeks before the operating rights were sold, was fatal to the grandfather rights and that they had expired. Every presumption has been indulged against appellants; circumstances which were responsible for decisions favorable to other applicants were ignored by the Commission or were said to have no bearing in this case.

On July 3, 1941 the Commission by Division 5 decided the case of *H. H. Enders Truck Line, Inc. Common Carrier Application*, 29 M. C. C. 639. In that case it appeared that Enders on January 24, 1936 had applied for a certificate of public convenience and necessity as a common carrier. On March 27, 1936 he sold to the Yellow Cab Transit Co. ten of his trucks and whatever interstate operating rights he

had in Texas and Oklahoma, including two certificates issued by the Railroad Commission of Texas and a permit issued by the Oklahoma Corporation Commission, which were subsequently transferred by the respective states to the Yellow Cab Transit Co. On April 11, 1936 Enders ceased operating and, as the Commission found on page 640 of its report, "The operations have not been continued since by anyone." The Commission then goes on to say on page 641:

> "* * * He discontinued because he had sold to applicant and was without State authority following the transfer of the certificates and permit to applicant. The record also indicates the Enders was in financial difficulties. Apparently for the same reason the Enders Corporation did not resume the operation following our approval of its substitution as applicant in lieu of Enders. It is clear that applicant was prepared and about to continue the operation when advised by our Bureau of Motor Carriers that such operation prior to our approval of the purchase, would be unlawful. It accordingly refrained from operating pending determination of the purchase application but it has continually and urgently requested prompt action thereon by the Commission. It also made application which was denied because we then had no power to grant temporary operating authority. A subsequent amendment of the act now permits us to authorize temporary operation under conditions prescribed by the amendment.
>
> Applicant contends its failure to resume the operation was due to the failure of this Commission to act upon the purchase application, a cause beyond its control; that it did everything possible to legally operate and should not be penalized because it complied with the law whereas other operators have been granted certificates where they operated purchased property without authority prior to the Commission's approval of the purchases."

The Commission found that Enders had sold because of financial difficulties but that there was no intention on the

part of anyone to abandon operations. Continuing, the Commission states at page 642:

"Applicant did not operate because it was advised by someone connected with our Bureau of Motor Carriers that to do so without first having obtained approval of the purchase would be a violation of the act. It accordingly made application immediately, but final action thereon has been withheld pending determination of the 'grandfather' application, although applicant has continually urged that we act without reference to the 'grandfather' application."

The Commission concluded as follows:

"Under the circumstances it would seem rather harsh to penalize applicant for its failure to operate in violation of the act. The record on the purchase application created considerable doubt as to the scope of vendor's 'grandfather' rights and for this reason, though contrary to our usual practice, we withheld action on the former pending determination of the latter. The latter, however, was in turn subject to delay because of the need for further hearing and the pressure of other work by reason of the large number of applications before us. Applicant did everything possible to operate legally, including the filing of an application for temporary authority but which, at that time, we were without power to grant. In the meantime, applicant was faced with a situation where it could neither legally operate nor control the circumstances. Ordinarily a delay in the final determination of a purchase application in no way excuses a failure of the seller to continue the operation pending our approval of the purchase in the usual course of administrative procedure, but the circumstances here are unusual.

Under the circumstances of this case we are of the opinion that the interruption of service was due to causes beyond applicant's control and a report and order of the Commission, division 5, authorizing the purchase and substitution of Yellow Cab Transit Company as applicant on the instant application is being served concurrently with our report and order herein."

These lengthy excerpts from the decision in the *Enders* case are given because they illustrate so perfectly the inconsistency of the Commission in disposing of these cases and its injustice in overlooking questionable conduct on the part of one applicant and of harshly penalizing another similarly circumstanced. Every fact to which the Commission gave consideration in the *Enders* case, in reaching its conclusion that the interruption of service was beyond the control of the applicant, is present in the instant case. If intent to abandon is the test, and obviously the Commission applied the test, then, since there clearly was no intent to abandon operations in the Gregg case, the decision should have been as favorable as in the *Enders* case.

As to the length of time of the interruption of service, it lasted but a few weeks in the Gregg case before application was made to the Commission to approve the sale. In this case the operations had been discontinued for over five years when the Commission entered its decision which permitted the resumption of operations. The sale and subsequent interruption were due to financial difficulties in the *Enders* case. So were they in the Gregg case. The failure to start operations after the sale was due to the advice and warning of someone from the Bureau of Motor Carriers and the fact that the applicant was waiting for a final determination by the Commission of its application in both cases. We submit that a more perfect example of discrimination in failing to apply the same rules of law to litigants in the same circumstances could not be found.

As to further consideration of the question of intention to abandon being the test, the Commission has said in the Gregg case that (R. 73) "it is not necessary that interruptions of service should rise to the height of an intentional abandonment before they can be deemed to be lost," and yet, in the *Enders* case, the lack of intention to abandon was one of the crucial points upon which the case turned.

In determining whether there was an interruption of service, as contemplated under the Motor Carriers Act, Sec. 206 A, it is necessary to take into consideration not only the length of time during which the service was interrupted but also the character of the operations and the circumstances under which the interruption of the service occurred. This rule is laid down in the case of *Black Hills Transportation Company, Common Carrier Application*, 2 M. C. C. 391, wherein the Interstate Commerce Commission, in effect, held that an interruption must be tantamount to abandonment in order to prevent a carrier from securing his certificate of convenience and necessity under the Grandfather's Clause.

In *Williams Transportation Co., Inc.*, Docket No. MC-9888, the Commission again had under consideration a case wherein there had been a cessation of operations because of a request or intimation by a representative of the Bureau of Motor Carriers that operations should cease, and yet the Commission found that :

> "The actual suspension was in supposed compliance with our views and with the understanding that such action would facilitate, rather than jeopardize, final approval of the application. At no time was there any intent to abandon the service. Under the circumstances, the interruption of service cannot be held fatal to any rights which might otherwise exist."

In *John Minnehan Contract Carrier Application*, 26 M. C. C. 533, the Commission stated as follows:

> "In determining whether interruption of service was beyond the control of applicant, the length of time of such interruption, as well as the character of the operation and the circumstances under which it occurred, must be considered."

If this is the true test, then the applicant in this case was much more entitled to receive the certificate than the applicant in the *Enders* case. The interruption in the

Gregg case occurred after control of the company had passed from the officers of the corporation and the length of time of the interruption was negligible, compared with the years in which there was no operation whatsoever by the Enders Company.

The Commission has been similarly inconsistent in connection with other interruptions which occurred because of financial difficulties or bankruptcy. In *Nevin Midland Lines Common Carrier Application*, 4 M. C. C. 547, a carrier had been adjudicated bankrupt in involuntary proceedings and had been enjoined from operating for nearly a month, yet the Commission said on page 550:

> "This interruption of service appears to have been one over which applicant herein had no control and it cannot be said to have destroyed the continuity of its operation."

In *Kirk Transportation Co. Common Carrier Application*, 7 M. C. C. 362, the applicant had met with financial difficulties and from May 28, 1936 through the first part of June of that year finance companies repossessed all but three units of his equipment. The Commission held that this curtailment of service caused by the action of the finance companies and the interruption of operations resulting therefrom were beyond the control of the applicant, stating at page 365:

> "When the finance companies began repossessing its equipment, its officers although recognizing that some curtailment was necessary, had no intention of abandoning the operations;"

Here again we have the intent to abandon as the test although it was rejected in the Gregg case. Other instances might be given wherein the Commission has taken similar action in refusing to be consistent in connection with financial difficulties and bankruptcy cases, but the examples given here well illustrate the course which these decisions have taken.

In *Rea & Starr Common Carrier Application*, 2 M. C. C. 387, it was held that where operations had been suspended because of notification by a representative of the Interstate Commerce Commission that service was being conducted without authority such suspension was not within the control of the applicant. In *W. D. Cochran Common Carrier Application*, 3 M. C. C. 717, operations had been suspended at the insistence of a State inspector. The Commission held that such suspension was not within the control of the applicant and also employed the intent to abandon test. The Commission said (p. 719):

> "Clearly, applicant and his predecessors at no time abandoned their service. They were willing at all times to carry interstate traffic and stopped only at the insistence of the State inspector, although they felt that the ruling relied upon by that inspector was invalid and unlawful. True, they did not institute court proceedings to test the validity of the ruling, but this, the record indicates, was due to their reluctance to engage in litigation with the State authorities. Rather, it appears that they preferred to contest the issue informally with the Michigan commission, which action is said to have resulted in the withdrawal of the ruling. In the circumstances, we conclude that the interruptions of service described were ones over which applicant and his predecessors had no control."

In *O & W Transit Company Common Carrier Application*, 4 M. C. C. 575, it was disclosed that there had been no operation over one of the routes applied for from January 10 to May 1, 1936. This interruption of service had been brought about by the fact that the Director of Highways of Washington had restricted truck operations of certain parts of it in accordance with certain weight limitations. This the applicant claimed would have permitted it to carry revenue loads of from only 1,000 to 1,900 pounds. The Commission stated (p. 577):

> "Applicant therefore concluded that it would not be profitable to operate under such load restrictions,

and accordingly discontinued operations over this route during the period mentioned.

"In determining whether an interruption of service was beyond the control of an applicant, the length of time of such interruption, as well as the character of the operations and the circumstances under which it occurred must be considered. Clearly the issuance of the State order was beyond the applicant's control. It is true that, by transporting loads within the limits set by that order, applicant could have continued to carry on operations and to render its common-carrier service, but it appears reasonably certain that such operations would have been unprofitable. Moreover, it is plain that applicant never intended to abandon its service in question and resumed it as soon as the order was rescinded."

The decision is particularly interesting because the Commission has so often stated that failure or refusal to operate because of lack of profit was no excuse. *Hunt Common Carrier Application*, 3 M. C. C. 261; *Conor Common Carrier Application*, 1 M. C. C. 327.

In *Flamming Common Carrier Application*, 20 M. C. C. 63, William J. Flamming filed a grandfather application in his own name, and on September 22, 1937, he received a copy of an order of the Commission in the name of Flamming Motor Express, Inc. that had been dismissed. The order was under the docket number assigned to Flamming, but the name thereon was not his own. Nevertheless, without any further investigation he discontinued operation until March 25, 1938, when the previous order was vacated and set aside. This was held to be a suspension of operation which was within the control of the applicant. Other instances might be given, but it is believed that the foregoing is sufficient to show that action of the Commission, or action by the State, either does or does not excuse interruption of service according to the whim of the Commission. Failure to apply the test equally to all applicants results in an unjust and arbitrary discrimination.

The Commission has been similarly discriminatory in cases involving illness, lack of insurance, lack of business, lack of capital and other causes. A representative list of these cases is set forth in Appendix B.

We submit that this long course of conduct on the part of the Commission, which is so perfectly exemplified by the instant case, should be condemned by this Court.

Respectfully submitted,

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APPENDIX A.

Part II of the Interstate Commerce Act.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Sec. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle, subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from

the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE.

Sec. 209. (a) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this para-

graph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES.

Sec. 212. (a) Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (a), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been

violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Bankruptcy Act Sec. 70 (B) 11 U. S. C. Sec. 110 (B).

Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Provided, however, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: Provided, however, That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt

and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment.

APPENDIX B.

Representative List of Cases Decided by Interstate Commerce Commission Involving Question of Whether or Not Interruption of Service Was Within the Control of the Applicant. Those Cases Decided Favorably to the Applicant are Marked *

ACTION BY COMMISSION		
Ray & Starr	* 2 MCC 385	
Miller Trucking Lines	10 MCC 485	
Stevens	13 MCC 714	
Flamming	20 MCC 63	
Hughes	22 MCC 219	
Enders	*29 MCC 639	
ACTION BY STATE		
Cochran	* 3 MCC 717	
O & W Transit Co.	* 4 MCC 575	
Perry	4 MCC 630	(violation of law)
Contract Carriers Sedan Travel Assn.	7 MCC 209	(violation of state law)
Caravans, Inc.	9 MCC 659	(state tax)
Lubfin	12 MCC 563	(state law and insurance)
James	14 MCC 723	(state confiscation of tags)
Crooks	23 MCC 509	
BANKRUPTCY		
Tanis	2 MCC 18	
Nevin Midland Lines	* 4 MCC 547	(injunction in connection with bankruptcy)
Sooner Distributing Co.	22 MCC 541	
Wisconsin Motor Exp. Co.	22 MCC 633	
Sunset Trail Exp.	22 MCC 713	(receiver)
Martin Motor Lines	23 MCC 313	
Knopp Broker Applic.	23 MCC 727	
Van Transp. Lines	24 MCC 302	
CHANGE IN ROUTE		
Capital Motor Lines	* 1 MCC 462	
Jaax	1 MCC 597	
Fleming	* 8 MCC 469	
Central Ky. Film Serv.	* 8 MCC 735	

Equipment, Loss or Damage of		
Hauptman	3 MCC 144	(loss of truck)
Southeast Arkansas Frt.	7 MCC 143	(lack equip. & capital)
Allen	8 MCC 743	(poor equip.)
Hughes	10 MCC 346	(damaged truck, insurance)
Jones	18 MCC 253	(trucks needing repair)
Brown	23 MCC 125	(execution on equip.)
Thompson and Bookshinis	22 MCC 503	(repair period)
R. D. Fowler Motor Lines	24 MCC 179	(repossession of truck)
Financial Difficulties		
Feigenbaum	1 MCC 745	(also illness)
Denco Bus Lines, Inc.	8 MCC 188	
Kirk Transp. Co.	* 7 MCC 362	
Northland Greyhound Lines	16 MCC 530	(fin. dif. of predecessor)
Shansky	17 MCC 797	(also physical disability)
Stewart	19 MCC 665	
Kaplan	20 MCC 70	(also injury)
Metro Motor Frt.	22 MCC 78	(refinancing)
White Star Frt. Line	23 MCC 407	
Brown	11 MCC 491	(and sale)
Illness and Death		
Blue and Grey Trucking Co.	9 MCC 193	
De Brine	9 MCC 51	
L. T. Puryear & Co.	10 MCC 377	(illness of officers)
Barringham	20 MCC 606	
Blackburn	20 MCC 747	
Conklin	*11 MCC 475	(death of predecessor)
Kaplan	20 MCC 70	
Insurance		
Lubfin	12 MCC 563	(also state law)
Gulf States Exp.	9 MCC 251	
Loss of Traffic or Lack of Traffic		
Black Hills Transp. Co.	* 2 MCC 391	
Penn Bus Co.	2 MCC 278	(voluntary interruption)
Baker	2 MCC 737	(availability of traffic)
Beekley	3 MCC 255	
Kirk Transp. Co.	* 7 MCC 362	(operation curtailed by receiver)
Woodrow Bros.	* 8 MCC 259	
Perkins	*10 MCC 495	
Berger	11 MCC 43	(traffic lost to competitor)

Oilfields Trucking Co.	12 MCC 16
Woods	13 MCC 737
Pachall	•14 MCC 224
Dovel	•14 MCC 357
Geroulo	•16 MCC 421
Brown & McCooey	18 MCC 503
Kelly	18 MCC 706
Union Transfer Co., Inc.	19 MCC 659 (slow traffic)
Sentle	21 MCC 49
Barnes Truck Co.	24 MCC 465
Road Repairs, Poor Roads	
L. & L. Freight Lines	• 2 MCC 9
Cardinal Stage Lines Co.	2 MCC 583
Mo-Ark Coach Lines	4 MCC 55
McKay	4 MCC 93 (roads closed by snow)
Angle Star Lines	16 MCC 189
Inter-Carolinas Motor Bus Co.	21 MCC 633 (road construction)
Silver Fleet	23 MCC 331
Walter Stages, Inc.	24 MCC 451
Transfer	
McCall	• 8 MCC 24
Johnson	11 MCC 665 (and repossession)
Cross	23 MCC 517
Weather	
Waltz Transp., Inc.	•10 MCC 30 (also breach of lease, strike)
Elliott	•11 MCC 148 (floods)
Miscellaneous	
George Cassens & Sons	1 MCC 771 (as to actual operation to all points claimed)
Southeast Arkansas Freight Line, Inc.	7 MCC 89
Holland Highway Exp.	8 MCC 461 (failure to commence service after purchase)
Holmes	• 8 MCC 391 (change by shippers)
Missouri Pc. Transp. Co.	9 MCC 273 (agreement with competitors)
Film Pickup Service	•10 MCC 364 (closing of theatres)
Brown	11 MCC 491 (sale and financial dif.)
Quaker Stages, Inc.	14 MCC 387 (uncertainty as to rights)
Western Truck Lines	14 MCC 369 (non-existent service)
Williams	14 MCC 747 (lack of identification tags)

Steel	MCC 99	(continuance of operation found though applicant advised Com. he intended to discontinue)
D. L. Hartman Cartage Co.	18 MCC 4	(operation by receiver)
Eaton	22 MCC 791	(inability operate profitably)
Riddle	22 MCC 204	(merely holding out)
Lewis Motor Transp. Lines	23 MCC 197	
Myers	23 MCC 451	(competition)
Mutual Transfer Co.	23 MCC 657	(foreclosure)

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No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1941

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE AND STORAGE COMPANY, AND NORTH-EASTERN TRANSPORTATION COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the District Court (R. 99–104) is reported in 42 F. Supp. 266. The reports of the Interstate Commerce Commission (R. 58–71, 71–82) are reported in 10 M. C. C. 255 and 21 M. C. C. 17.

JURISDICTION

The decree of the District Court was entered on May 19, 1941 (R. 110). The petition for ap-

peal was presented on July 14, 1941 (R. 111), and was allowed on the same day (R. 114). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219 (U. S. C., title 28, secs. 45a, 47a); section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (U. S. C., title 28, sec. 345); and by section 205 (h) of the Motor Carrier Act, 1935,[1] c. 498, 49 Stat. 543 (U. S. C., title 49, sec. 305 (h)).

QUESTIONS PRESENTED

1. Whether the "grandfather" period specified in the proviso of section 206 (a) of the Motor Carrier Act, 1935, extends from June 1, 1935, until the time when the Interstate Commerce Commission acts on the application of a carrier claiming "grandfather" rights.

2. Whether discontinuance of operations by such a carrier as the result of involuntary bankruptcy constitutes an interruption of service over which the applicant had no control, within the meaning of the "grandfather" clause.

STATUTE INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, applicable at the date of the Commis-

[1] This statute was in force on December 12, 1939, the date of the Commission's order. The Transportation Act of 1940, 54 Stat. 898, approved September 18, 1940, renumbered this provision as Interstate Commerce Act, Part II, section 205 (g).

sion's order, December 12, 1939, are set forth in the Appendix, *infra*, pp. 36–38.

STATEMENT

The underlying facts of the case are not in dispute, and the findings of the Commission [2] may be summarized as follows:

In 1935 and earlier, Gregg Cartage & Storage Company, an Ohio corporation, operated as a common carrier of general freight between points in several northeastern states (R. 59–60, 72). Its method of operation was to assemble freight at terminals, which it maintained in 12 cities, and to procure transportation of the freight by owner-operator vehicles; Gregg Company performed no over-the-road service with its own vehicles (R. 60).

During the year 1936 Gregg was insured against public liability and property damage by the Central Mutual Insurance Company of Chicago. Upon learning that the insurer was in an unsound financial condition and after it had failed to protect Gregg against some claims, the Gregg Company discontinued its insurance with Central Mutual and placed similar insurance with Auto Mutual Insurance Company, paying the premiums in advance. On January 11, 1937, Central Mutual was adjudged a bankrupt, and ceased to pay any claims (R. 60). In later months of 1937 Gregg was obliged itself to satisfy several sub-

[2] The full Commission adopted the statement of Division 5 (R. 59–62) concerning the facts (R. 73).

stantial claims for damages arising from accidents which occurred in the course of its carriage business during the period when insurance was in effect with Central Mutual (R. 60–61). Gregg also paid additional claims in the amount of approximately $15,000 for loss of cargo, in order to retain the good will of shippers when two other insurers failed to protect Gregg, relying upon technical insurers' defenses under Ohio law (R. 61; 33). In addition, the company was still confronted with approximately 175 claims for personal injury and property damage, estimated to aggregate $200,000. Gregg attempted to settle these claims, conducting in some instances extended negotiations; at length it appeared impossible that all of the demands should be satisfied in full (R. 61).

Gregg had been solvent on June 30, 1937; it then had assets of nearly $200,000, liabilities of $130,000, capital stock of $10,000, a reserve of $30,000, and $25,000 in surplus. By October 30, 1937, it had become insolvent, with debts of $360,000 and assets amounting to only $240,000 (R. 63). The company arranged the filing on October 4, 1937, of a creditor's bill in the Court of Common Pleas for Cuyahoga County, Ohio (R. 61, 31). On October 5, 1937, that court appointed a receiver with authority to continue operation of the Gregg Company's business. On the same day, other creditors of Gregg filed a petition in bank-

ruptcy against it in the District Court of the United States for the Northern District of Ohio (R. 61).

The state court receiver, in operating the business after October 5, confined himself to effectuating deliveries of shipments en route, without soliciting new business. On October 14, 1937, he filed a petition with the Interstate Commerce Commission to suspend operation without prejudice to Gregg's operating rights under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (R. 61). The petition was denied by the Commission in an order dated November 30, 1937 (R. 61–62).[3]

On October 27, 1937, Gregg was adjudged a bankrupt by the federal court. On October 30 a receiver in bankruptcy was appointed, with instructions to take charge of all the assets and preserve them, pending the election and qualification of a trustee, have an inventory and appraisal made, and prepare for a sale. The federal receiver took over Gregg's business on the same day (R. 61). He confined his management to liquidating the business, and conducted no operations after his appointment. Pursuant to an order of the bankruptcy court, the rights, trade names, and

[3] The Commission gave as its reason lack of power to authorize such a suspension (R. 62).

[4] The trustee, one of appellants here, was appointed near the end of December 1937 (R. 1).

goodwill of the bankrupt estate were sold for $850 at public auction on December 6, 1937, to the Northeastern Transportation Company[5] (R. 62). The receiver in bankruptcy made formal transfer of the operating rights to Northeastern on December 24, 1937 (R. 75).

The Gregg Company had filed an application with the Interstate Commerce Commission on February 12, 1936, for a certificate of public convenience and necessity as a common carrier, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act (R. 59). A hearing was held on June 8 and 9, 1937, before an examiner of the Commission (R. 21). The examiner's report was filed December 17, 1937, and recommended granting the common carrier certificate applied for (R. 7–18). The Northeastern Company and the receiver in bankruptcy filed a joint application with the Commission on January 7, 1938, asking that Northeastern, as Gregg's successor, be substituted as applicant in place of Gregg; action on this application was withheld by the Commission pending a determination of Gregg's rights (R. 62). The management of Northeastern considered a resumption of operations, but decided

[5] Northeastern was organized for the purpose of taking over the business of Gregg Cartage and Storage Company (R. 62). Joseph Gregg, former president of Gregg Company, is Northeastern's general freight agent, and Henry Lockhart, former superintendent of transportation of Gregg Company, is a stockholder of Northeastern (R. 62; 43–46).

against it on the advice of field representatives of the Interstate Commerce Commission (R. 48, 92). On February 11, 1938, the Commission ordered a further hearing on the original application (R. 52), which was held before another examiner on May 4, 1938 (R. 20–21).* The second examiner's report made the same recommendation.

Exceptions to the recommended order were filed by protestant rail carriers, which had appeared throughout the proceedings on Gregg's application (R. 59; 8, 21, 52, 58). Division 5 of the Interstate Commerce Commission denied the application on November 14, 1938, Commissioner Lee dissenting (R. 58, 59, 65). The report of the majority ruled that an interruption of service within the control of the applicant had occurred after October 30, 1937, that the purchase by Northeastern from Gregg had conferred on Northeastern no operating rights, and that therefore neither corporation was entitled to an authorization under the "grandfather" clause (R. 65). A reargument was held before the full Commission (R. 71), and on December 12, 1939, it affirmed the findings and conclusions of Division 5 (R. 71, 79). Five Commissioners dissented from the report (R. 79, 80, 82).

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*This hearing related only to the circumstances of the interruption of Gregg Company's service (R. 24–25). A transcript of the proceedings before the examiner was attached to the original complaint in this case as Exhibit B and appears in the Record at pages 21–50.

Gregg Company and its trustee in bankruptcy then filed a complaint against the United States and the Interstate Commerce Commission in the District Court of the United States for the Northern District of Ohio, Eastern Division, on June 7, 1940, praying that the order of the Commission denying Gregg's application be annulled and set aside and that the Commission be directed to issue a certificate of public convenience and necessity to Gregg (R. 1, 6). The Interstate Commerce Commission and the United States answered on July 23, 1940, and July 26, 1940, respectively (R. 82, 87). Northeastern Transportation Company moved to intervene on August 30, 1940 (R. 88); its motion was granted by the court on September 20, 1940 (R. 90), and Northeastern filed its bill of complaint on the same day (R. 90–93). Answers to this bill were filed by the Commission and the United States on October 18, 1940, and November 5, 1940, respectively (R. 93, 94). An order convening a statutory court of three judges was issued on January 4, 1941 (R. 98). On January 29, 1941, the case was tried to the court (R. 98–99); in a *per curiam* opinion dated February 20, 1941, the court held the Commission's order valid (R. 99–104). It made findings of fact and announced conclusions of law (R. 106–110), and on May 19, 1941, issued its final decree dismissing the complaint (R. 110).

SUMMARY OF ARGUMENT

I

The operations of an applicant for authority under the "grandfather" clause must be *continuous* during the statutory period prescribed for the acquisition of rights. The period extends from June 1, 1935, until the date when the Interstate Commerce Commission acts upon the application; it is not determined by the effective date of the Motor Carrier Act (October 15, 1935) or by the date of the filing of the carrier's application (February 12, 1936, in the case of appellant Gregg Cartage & Storage Company).

II

Gregg's cessation of operations by October 30, 1937, as the result of involuntary bankruptcy did not constitute an interruption of service over which Gregg had no control. The Commission properly ascribed the interruption to business difficulties of the applicant which it would have been possible for the company to avoid; the Commission was not required to probe underlying causes of Gregg's failure and to seek out facts behind the company's act of bankruptcy. The Commission decided appellant Gregg's application in accordance with the construction it has placed on the statutory language in similar cases. Since that construction is warranted by the language and

purpose of the statute and is a reasonable administrative interpretation, it should not be disturbed.

The Commission was justified in holding that the discontinuance of transportation extending from October 30, 1937, until January 7, 1938, (the date of Northeastern's filing of its application for substitution) was attributable to the applicant, and that the period of interruption was sufficient to extinguish the "grandfather" rights. The carrier was not entitled to any period of grace after the cessation of operations because of the provisions of section 212 (a) of the Motor Carrier Act.

ARGUMENT

Section 206 (a) of the Motor Carrier Act, 1935, contains a general prohibition on operation by common carriers in interstate or foreign commerce without a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The "grandfather" proviso in the section directs the Commission to issue a certificate to a carrier, without further proof of public convenience and necessity—

> * * * if * * * such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control * * *.

Appellant's principal contention on this appeal is that the discontinuance of Gregg Company's transportation after October 30, 1937, was an interruption of service over which Gregg had no control (Br. 27–53). They contend additionally that a carrier which operated from June 1, 1935, to October 15, 1935, the effective date of the Motor Carrier Act, is entitled to a certificate without any showing of operation after that period. If the latter contention were sound, the former would be eliminated from the case as an issue. Accordingly, our argument is addressed first to the question of the extent of the period of required operation under the proviso in section 206 (a).

I

AN APPLICANT UNDER THE "GRANDFATHER" CLAUSE MUST SHOW OPERATION FROM JUNE 1, 1935, TO THE TIME OF THE COMMISSION'S ACTION ON THE CARRIER'S APPLICATION

1. *Continuity of operation.*—Appellants urge preliminarily in their discussion of this point that the statute does not require *continuous* operation during the "grandfather" period, whatever the length of the period is determined to be. The contention is untenable in view of the plain language of the statutory provision: "was in bona fide operation * * * on June 1, 1935, * * * and has so operated since that time, * * *." The decision of this Court in *United States* v. *Maher*, 307 U. S. 148, is conclusive against it; in that case a carrier had conducted operations over irregular routes in Oregon and Washington from 1931 until

May 1936; subsequently he did not engage in this transportation. In October 1937 the Interstate Commerce Commission acted upon his application filed in January 1936, denying him authority to operate since his operation had not been continuous but had been abandoned. This Court reversed the decree of a district court setting aside the Commission's order, and expressly approved the Commission's construction of the statute. *Id.* at 155.

The legislative history of the "grandfather" clause affords no support for appellants' contention. As they state (Br. 24), the bill which became the Motor Carrier Act, 1935, originally contained an expressed requirement of "continuous" operation. But it is clear from the statement of Senator Wheeler, chairman of the Senate Committee in charge of the bill, that the striking of the words "continuous" and "continuously" was effected only to insure that there would be no apparent inconsistency between the main part of the clause and that excepting interruptions beyond a carrier's control. See 79 Cong. Rec. 5654. The amended provision carried on the requirement of *continuous* operation aside from the specifically excepted interruptions of service.

2. *Length of the "grandfather" period.*—The Commission has taken the view in administering the Motor Carrier Act that an applicant, in order to establish present operating rights, must show transportation from the "grandfather" date up to the time when the Commission acts on his

application. If another rule had obtained, the carrier in *United States* v. *Maher, supra,* would have been entitled to receive a certificate of public convenience and necessity, since he had been in operation from June 1, 1935, to October 15, 1935 (the effective date of the Motor Carrier Act), and was still operating on January 24, 1936 (the date of Maher's application).[7] However, this Court, in sustaining the Commission's denial of an authorization, said in its opinion:

> * * * Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application. [307 U. S. at 155–156.]

In a petition for limited rehearing Maher urged that his operating rights should be viewed as determined in the period from June 1, 1935, to October 15, 1935.[8] The petition was denied May

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[7] Appellants here asserted in the District Court that the time when application is filed determines the "grandfather" period (R. 6). The opinion of the court below in dealing with the issue was responsive to that contention (R. 102–103). The Commission and the federal district courts have consistently rejected it. *Hoerman* v. *United States* (No. 852, W. D. Mo., June 5, 1941); *Howard Hall Co.* v. *United States*, 38 F. Supp. 556 (N. D. Ala.); *Atlantic Motor Exp. Inc.*, 12 M. C. C. 576.

[8] Maher was joined in this contention by an *amicus curiae*, counsel for the appellant in *Hoey* v. *United States* (N. D. Ill.

15, 1939. 307 U. S. 649. The opinion of the Court in *Lubetich* v. *United States* (No. 322, this term, decided January 19, 1942), stated in regard to "grandfather" applications by owner-operators:

> * * * The question in both situations is whether the applicant was a carrier, either common or contract, within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing. * * *

We submit that the administrative construction placed on the statute by the Commission, concerning the length of the "grandfather" period, and approved in decisions of this Court, is no longer open to question.

II

DISCONTINUANCE OF GREGG COMPANY'S OPERATIONS AFTER OCTOBER 30, 1937, WAS NOT AN "INTERRUPTION OF SERVICE OVER WHICH THE APPLICANT HAD NO CONTROL"

A. THE POLICY OF THE STATUTE

At the outset, the background of the statute as shown by the announced legislative purpose should be noticed. In section 202 (a) of the Motor Carrier Act, 1935, Congress recited:

> It is hereby declared to be the policy of Congress to regulate transportation by mo-

---

October 23, 1939), where the length of the "grandfather" period was in issue. The court there decided against the carrier's interpretation of the statute as requiring operation only until the effective date; this Court affirmed the decree *per curiam* on appeal. 308 U. S. 510.

> tor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; * * *

As the court below pointed out (R. 104), continuous operation in the service being performed by particular carriers is an essential of adequate and efficient public service. Express legislative recognition of continuity as a requirement appears in section 204 (a) of the statute, which provides:

> It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, * * *.

The "grandfather" clause was inserted in section 206 (a) of the Act to permit continued performance, after enactment of the federal regulatory legislation, by established motor carrier businesses of the transportation in which they had engaged on June 1, 1935, and to assure to the public continuation of the service which had been available on the "grandfather" date; in writing the "grandfather" clause Congress proceeded on

the assumption that any carrier which was in bona fide operation on June 1, 1935, and continued so to operate thereafter was rendering a transportation service the continuation of which was required for the public convenience and necessity. Any interruptions of service would prejudice the public interest in available motor carrier transportation, since shippers would still require facilities. The result of any substantial interruption would be diversion of shippers' needs to other modes of carriage, expansion of a competing carrier, or entrance of a new carrier into the field under a certificate of public convenience and necessity issued by the Interstate Commerce Commission on the merits under section 207 of the Motor Carrier Act. The effect of the interrupting carrier's subsequent resumption of operations would be to overcrowd the transportation market in which it competed, aggravating the conditions in the motor carrier industry which the statute was designed to alleviate. Congress, by legislative grace, excepted interruptions over which a carrier had no control.

In view of these considerations, the "grandfather" clause should be narrowly construed in order that achievement of the essential objects of the Act should not be hindered. See *McDonald* v. *Thompson*, 305 U. S. 263, 266.

B. THE FUNCTION OF THE COMMISSION

The ultimate issue in the present case is whether the applicant for a certificate under the

"grandfather" clause has brought its case within the terms of the proviso in section 206 (a): specifically here whether the interruption in Gregg's service after October 30, 1937, was one beyond the company's control. The Interstate Commerce Commission is given the duty of passing on applications, and it must make initial determination of the question whether the facts of an applicant's claim entitle him to a "grandfather" certificate. In doing this, the Commission must make findings of fact; these are conclusive if supported by substantial evidence. See *United States* v. *Maher*, 307 U. S. 148, 154. Questions of expert judgment, going beyond the finding of subsidiary facts, are also presented to the Commission for decision. And here, too, the determination of the administrative body will not be disturbed on judicial review if the determination is warranted and reasonable. *Gray* v. *Powell* (No. 18, this Term, decided December 15, 1941); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

The Commission in the present case determined that the Gregg Cartage & Storage Company had not shown that it had been in bona fide operation on June 1, 1935, and continuously thereafter to the time when the Commission acted on its application, since its transportation had ceased by October 30, 1937, and since the interruption which

occurred was not one which had not been within the company's control according to the statutory meaning. Appellants assail that judgment as arbitrary and improper; the Government urges on the other hand that it was informed and correct.

C. CESSATION OF OPERATION OWING TO INVOLUNTARY BANKRUPTCY IS AN INTERRUPTION WITHIN A CARRIER'S CONTROL

1. *The Bankruptcy Act.*—Section 3b of the Act of July 1, 1898, 30 Stat. 546, as amended (11 U. S. C., sec. 21 (b)), provides that an involuntary petition in bankruptcy may be filed against a person who in the preceding four months has committed an act of bankruptcy. Section 3a (11 U. S. C., sec. 21(a)) defines such acts as (1) fraudulent conveyances or concealments of property, (2) transfers while insolvent, (3) permitting, while insolvent, a creditor's lien to attach to property through legal proceedings, (4) assignments for the benefit of creditors, (5) permitting or procuring, while insolvent in either the bankruptcy or equity sense, a receiver to be appointed to take charge of the bankrupt's property, (6) admissions in writing of inability to pay debts and of willingness to be adjudged a bankrupt. The statute has thus made the filing of an involuntary petition contingent upon the happening of specified events with respect to the bankrupt, which Congress has cast in terms of *acts* of bankruptcy on the part of the person against whom the petition is filed.

In *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, a transfer company had contracted to furnish a continuing service and was rendered unable to perform by involuntary bankruptcy. The promisee asserted its claim for breach of contract in the bankruptcy proceeding. Holding that the claim was provable, because founded on an anticipatory breach the Court said (p. 591):

> * * * In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. * * *

The opinion there viewed bankruptcy as the equivalent of a deed or expression breaching the contract on the part of the promisor, and the commission of an act of bankruptcy as a voluntary act done by the bankrupt in the course of its business.*

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* Appellants challenge the authority of this case (Br. 42–44) on the ground that its holding has been superseded by the amendment of section 70 of the Bankruptcy Act (U. S. C., title 11, sec. 110 (b)), which provides that the trustee in bankruptcy shall assume or reject executory contracts within 60 days after adjudication. Congress by inserting this provision in the Chandler Act of course imposed a new rule of positive law in bankruptcy concerning executory agreements,

Gregg Company committed an act of bankruptcy on October 4, 1937, in procuring a creditor's bill to be filed in a state court asking for the appointment of a receiver in equity. The Interstate Commerce Commission said in its report (R. 73) that before bankruptcy the company "had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims. It is presumed to know that if it fails to conduct its business in such a way as to provide for obligations incurred by its operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the continuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of the motor carrier which lead to the bankruptcy." Thus the Commission ruled that an interruption of service on account of the applicant's bankruptcy was for that reason alone not one beyond its control for the purposes of the Motor Carrier Act, and declined to inquire further into the particular circumstances of the bankruptcy.

2. *The Underlying Causes of a Carrier's Bankruptcy Are Not Material.*—The report of the

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anticipatory breach, and provable claims, but in no way altered the character of acts of bankruptcy or negatived the *rationale* of the Court's decision in the *Chicago Auditorium* case.

majority Commissioners recognized that the source of a particular bankruptcy might be found in purely accidental misfortune rather than in wrongful or even merely negligent conduct on the part of the bankrupt (R. 74). Accordingly, appellants contend (Br. 18, 27) that the Commission erred in not holding relevant the apparent cause of Gregg's business failure. They assert that the unforeseen payment of damage claims was the sole cause, that the company was protected by proper and adequate insurance, and that the effective event in Gregg's history was the insolvency of one insurer and the refusal of two others to indemnify Gregg. Their argument is essentially reducible to the following contention: although an interruption of service may have been within the control of the management in the sense that the transportation service could have continued regardless of the mishap, the interruption ought not to extinguish the applicant's "grandfather" rights if the mishap was not reasonably foreseeable so that the management should have forestalled the interruption. We think that this criterion borrowed from the private law of torts was not what the statute intended to be the test. Rather, the standard is factual, directing the administrative agency standing outside to determine whether the interruption in a carrier's service was in fact avoidable by the carrier without substantial alteration of the transportation performed.

Adoption of the criterion advanced by appellants would compel exact inquiry by the Commission in each case into the circumstances surrounding every act of the bankrupt which played a part in bringing about the financial debacle, in order to determine with reference to each decision on conduct taken by the bankrupt whether the course pursued as a result of choice was reasonably prudent. In employing such a criterion in the present case, the Commission's investigation could not stop at the failure or refusal of insurance companies to pay claims; it would have to extend to the questions whether Gregg should have insured so largely with one company, whether the Central Mutual was a reasonable risk on the basis of its financial position and not chosen primarily for attractively low rates, whether Gregg could by ordinarily diligent supervision of its carrier operations and should have kept the damage claims against it to a smaller total,[10] and whether as an original proposition the owner-operator method of transportation which it employed was prudent.[11] These, in

[10] As of June 30, 1937, Gregg Company had a surplus and reserve of $55,000; if the Commission should find that sound business methods would have confined the company's liabilities within that figure or within some limit commensurate with earning capacity, then it might follow that poor management rather than the failure of the insurance company was the "cause" of Gregg Company's interruption of service.

[11] In order to exhaust the principal inquiry it might have been necessary for the Commission to examine the circumstances of the claims presented and pass on Gregg Company's tort or carrier liability in each case.

broad outline, are some of the lines of inquiry which the Commission must have pursued on appellants' theory of the statute; it would also have been obliged first to determine what elements of conduct on the part of Gregg were contributory and whether in a material degree.

The very great difficulties of such a procedure are evident; the speculative character of the results likely to be produced further persuades against the interpretation of the "grandfather" clause contended for by appellants. Proper construction of the language "interruptions of service over which the applicant or its predecessor in interest had no control" demands that the carrier show that its transportation was interrupted through the agency of an external cause with which the carrier plainly had no connection in transacting its business. The Commission accordingly has taken the position that bankruptcy and other immediate causes of interruption which are engendered by business reverses are not beyond a carrier's control.

3. *The administrative practice.*—In passing on the "grandfather" applications of carriers whose service has been interrupted, the Commission over a long period has adhered to the principles of construction of the exceptive language upon which its decision in this case was reached and which we have stated above. A consistent pattern of adjudication is shown by the reports in cases

where the issue of control over interruption has been raised.

Interruptions of service owing to floods,[12] snow,[13] unsafe[14] or impassable[15] roads, highway construction,[16] or drought where it destroys a carrier's chief source of business[17] have been ruled interruptions over which a carrier has no control. Likewise, the Commission has held that ill health,[18] strikes,[19] or the illegal action of governmental authorities,[20] constitute grounds for holding that an interruption of service is beyond an applicant's control.

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[12] *A. O. & T. Motor Lines, Inc.*, 8 M. C. C. 739, 741; *Waltz Transportation, Inc.*, 10 M. C. C. 30, 33; *Hubert C. Elliott*, 11 M. C. C. 148; *Cardinal Stage Lines Co.*, 2 M. C. C. 583, 585; *Durant Transit Co.*, 7 M. C. C. 264, 266; *Mercury Motors, Inc.*, 7 M. C. C. 557, 558.

[13] *Lewis McKay*, 4 M. C. C. 93, 94.

[14] *Edwards Motor Transit Co., Inc.*, 2 M. C. C. 73.

[15] *Inter-Carolinas Motor Bus Co.*, 21 M. C. C. 633, 635; *Silver Fleet of Memphis, Inc.*, 23 M. C. C. 331, 337; *Walter Stages, Inc.*, 24 M. C. C. 451, 454; *L. & L. Freight Lines, Inc.*, 2 M. C. C. 9, 11; *St. Andrews Bay Transportation Co.*, 1 M. C. C. 306, 307; *Mo-Ark Coach Lines, Inc.*, 4 M. C. C. 55, 56; *Rio Grande Motor Way, Inc.*, 3 M. C. C. 9, 10; *Panhandle Stages, Inc.*, 7 M. C. C. 743, 744.

[16] *Magee Truck Lines, Inc.*, 28 M. C. C. 386.

[17] *Barnes Truck Co., Inc.*, 24 M. C. C. 465.

[18] *H. B. Blackburn*, 20 M. C. C. 747.

[19] *Motor Freight Exp.*, 26 M. C. C. 374; *Transamerican Freight Lines, Inc.*, 28 M. C. C. 493; *Nielson & Peterson*, M. C. 41275, Aug. 11, 1941.

[20] *W. D. Cochran*, 3 M. C. C. 717, 719; *W. H. Tompkins Co.*, 29 M. C. C. 359.

On the other hand, abandonment of operations in unprotesting acquiescence to illegal state action,[21] cessations occasioned by failure or refusal to secure proper license fees,[22] operating authority,[23] or compulsory insurance[24] have been held not to be interruptions of service over which a carrier has no control. And an applicant for "grandfather" authority is held responsible for discontinuing service on account of the dilapidated condition of his equipment,[25] because he cannot secure sufficient business,[26] or cannot transport at a profit the business that is available.[27]

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[21] *West Texas Motor Freight Lines, Inc.*, 6 M. C. C. 598.

[22] *Milwaukee Truck Service, Inc.*, 17 M. C. C. 647, 653; *Crouch Transportation System, Inc.*, 26 M. C. C. 433, 437.

[23] *Paul Stuart*, 10 M. C. C. 470, 471; *Lennerton Motor Transp., Inc.*, 17 M. C. C. 779; *R. E. Perry*, 4 M. C. C. 630, 632; *Thomas James, Jr.*, 14 M. C. C. 723, 724; *M. C. Williams*, 14 M. C. C. 747, 748; *All American Bus Lines, Inc.*, 18 M. C. C. 755, 758; *H. T. Hough*, 20 M. C. C. 55, 56; *T. W. Crooks*, 23 M. C. C. 509, 512; *Paulmaur Transp. Co., Inc.*, 28 M. C. C. 395, 398; *Benjamin Franklin Line, Inc.*, 1 M. C. C. 97, 100; *Motor Express, Inc.*, 3 M. C. C. 315, 318.

[24] *Contract Carriers Sedan Travel Assn.*, 7 M. C. C. 209, 213; *Harry L. Sloan*, 6 M. C. C. 471, 472; *E. S. Lubfin*, 12 M. C. C. 563; *Gulf States Express, Inc.*, 9 M. C. C. 251, 254; *Isidore Kaplan*, 20 M. C. C. 70, 71.

[25] *Luther Jones*, 18 M. C. C. 253.

[26] *Samuel Coralluzzo*, 8 M. C. C. 576; *William Beckley*, 3 M. C. C. 255, 256; *Leland M. Sheeley*, 3 M. C. C. 387, 388; *W. O. Standring*, 26 M. C. C. 257, 258; *F. W. Myers*, 23 M. C. C. 451, 453.

[27] *H. A. Connor*, 1 M. C. C. 327, 328; *G. W. Rickerd*, 10 M. C. C. 89, 90; *Howard R. Hunt*, 3 M. C. C. 261, 264; *Ziffrin's Overnite Express, Inc.*, 28 M. C. C. 379, 381; *Marvin R. Newton*, 4 M. C. C. 227.

Similarly, interruptions of service which are consequent upon the incidence of ordinary business hazard are not beyond a carrier's control. Diversion of freight to a low-bidding competitor,[28] or to a competitor claimed to be doing business illegally,[29] loss of business occasioned by a shipper's failure to renew its contract,[30] by the shipper's moving away,[31] or its deciding to haul its traffic in its own trucks[32] have not been held causes of interruption over which carriers have no control. In the same category are cases where discontinuance of operations has been owing to financial difficulties resulting in insolvency or loss of equipment,[33] in voluntary[34] or involuntary[35] receivership, or in voluntary[36] or involuntary[37] bankruptcy. In none of these situations has the Commission undertaken to determine control over interruption on the basis of underlying cause; instead, it has considered the circumstances objec-

[28] *Emma Berger*, 11 M. C. C. 43, 44.

[29] *Frances B. Murphy*, 19 M. C. C. 727, 734.

[30] *Coast Line Express, Inc.*, 9 M. C. C. 427, 428.

[31] *R. E. Riddle*, 22 M. C. C. 204, 206.

[32] *Burlington Truckers, Inc.*, 29 M. C. C. 345.

[33] *Murray Feigenbaum*, 1 M. C. C. 745; *Truck Transport, Inc.*, 22 M. C. C. 70, 71; *Guy W. Brown*, 23 M. C. C. 125, 127; *White Star Freight Line, Inc.*, 23 M. C. C. 407, 408; *Mutual Transit Co., Inc.*, 23 M. C. C. 657.

[34] *Burlington Truckers, Inc.*, 29 M. C. C. 345.

[35] *Sunset Trail Express, Inc.*, 22 M. C. C. 713; *Puget Sound-Portland Lines, Inc.*, M. C. 15603, Sept. 27, 1941.

[36] *Klaus E. Tapis*, 2 M. C. C. 18; *Henry A. Welz*, 28 M. C. C. 451.

[37] *Gregg Cartage & Storage Co.*, 10 M. C. C. 255, 21 M. C. C. 17.

tively and has held the carrier charged with factual control over interruptions of service wherever those were attributable to business difficulties.

Consistently with that view the Commission has not attempted to distinguish between forms of insolvency proceedings which result in an interruption of service; whether a bankruptcy is voluntary or involuntary, or whether a receivership is in the first instance for liquidation or is originally for operation, which later turns out to be impossible, has not been thought significant. The controlling consideration has been the cessation of operations owing to business reverses.

The Government urges that this course of administrative construction of the statute should be sustained.

4. *Effect of the rule on bankruptcy administration.*—The dissenting Commissioners stated (R. 67–68, 80–81) and appellants now contend (Br. 40–42) that the effect of the Commission's rule concerning bankruptcy as a cause of interruption within a carrier's control is to make it impossible for a motor-carrier business to emerge from a financial composition and reorganization in possession of "grandfather" operating rights. On the contrary, it is plain that where operations have continued uninterrupted during receivership [38] or bankruptcy [39] the rights emerge unimpaired.

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[38] *D. L. Hartman Cartage Co.*, 18 M. C. C. 4.

[39] *Kirk Transportation Co.*, 7 M. C. C. 363; *Universal Interstate Freight, Inc.*, 30 M. C. C. 13.

As appellants state in their brief (Br. 35–36), a bankruptcy receiver or trustee is not empowered merely by virtue of appointment to conduct the business of the bankrupt estate; a specific authorization is required, and he is under no duty to apply for one. The result is that where the court believes that continued operation is impossible or is against the financial interests of the estate, there will be an interruption in the bankrupt carrier's service which extinguishes the carrier's rights. We think that this is a reasonable result; if operations are conducted during bankruptcy, the public interest in continuation of particular transportation is served; if they are not, shippers must find other means of carriage, and the interrupting carrier's reentrance into the field will produce a surplus of transportation facilities.[40]

It is said that the Commission's rule destroys a bankrupt's assets; but the value of "grandfather" rights is likely to have been merely nominal where the bankruptcy court has declined to authorize a continuance of operations.[41] In any event, the whole of petitioner's argument on the

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[40] This point is discussed more fully at page 16, *supra*.

[41] In all probability the bankruptcy court in the present case was influenced by Gregg's method of transportation, through owner-operators, and concluded that it would be impractical for a court officer to attempt to carry on the business through their agency. Thus the company's rights here were particularly volatile by reason of the nature of its operations.

present point is without foundation since the Bankruptcy Act does not purport to enlarge the property rights of the bankrupt and only empowers the bankruptcy court to dispose of such property as the bankrupt may be found to have by reference to other sources of substantive right, including the Motor Carrier Act properly construed.

D. LENGTH OF INTERRUPTION

Appellants also challenge (Br. 26–27) the statement by the majority of the entire Commission on reargument (R. 75), "* * * it is useless to speculate upon the question whether the 'grandfather' right [of Gregg Company] expired before or after the sale [to Northeastern Transportation Company]", contending that it indicates a failure on the part of the Commission to make any finding concerning the length of interruption in service and that in consequence the ultimate determination of a fatal break was arbitrary. This argument overlooks entirely the reason given by the Commission for its statement and the Commission's treatment of interruption in analogous situations.

The report stated that the interruption in Gregg's service after the sale to Northeastern, as well as before, was to be ascribed to the bankruptcy because the receiver's transfer of rights was ineffective for purposes of the Motor Carrier Act until the Commission had approved it; the

seller must ordinarily continue its operations to the date of such approval to avoid the consequence of a fatal interruption. See *H. H. Enders Truck Line, Inc.*, 29 M. C. C. 639, 643. This approval is effected through the filing by the purchaser of an application for substitution in the main "grandfather" clause proceeding before the Commission; the Commission then acts on the application, and, when it is granted, the risk of not continuing operations devolves on the purchaser. The Commission's requirement that it approve a transfer of rights is entirely reasonable in view of its interest in seeing that an alleged purchaser is actually the successor in interest to the rights of a "grandfather" applicant and in rendering the purchaser amenable to the Commission's eventual order in the principal proceedings.[42]

If the Commission grants an application for substitution shortly after the application is filed, at a time when the merits of the principal "grandfather" application have not been determined, the purchaser must then, nevertheless, operate the transportation service in order to preserve the "grandfather" rights against an interruption within the *purchaser's* control. *Cook & Koch*, 27 M. C. C. 361 (bill of carrier to enjoin order dis-

[42] This requirement of the Commission's approval of transfer of "grandfather" rights is now embodied in regulations of the Interstate Commerce Commission promulgated July 1, 1938. 3 Fed. Reg. 2157, Rule 1 (d).

missed February 3, 1942, District Court of the United States for the Northern District of Illinois); *Louis C. Dearman*, 27 M. C. C. 619 (bill of carrier to enjoin order dismissed January 28, 1942, District Court of the United States for the Northern District of Ohio). The eventual right of the purchaser to a certificate of public convenience and necessity remains subject to the Commission's decision on the original application. *Crouch Transportation System, Inc.*, 26 M. C. C. 433; accord, *Brooks Transportation Co., Inc.—Purchase—Jacobs Transfer Co.*, 5 M. C. C. 85. Thus the purchaser may be induced to incur considerable expense in undertaking operations during the interim, when ultimately it may be held that the purchaser acquired no operating rights at all; the hardship that would result in such a case is apparent.

To forestall its occurrence, the Commission has promulgated a regulation which provides against the granting of an application for substitution where at the time of filing it appears that an interruption of service is current unless the interruption is shown to be beyond the carrier's control or unless present operation, by the purchaser, is required in the public interest. Regulations of July 1, 1938, 3 Fed. Reg. 2157, Rule 6. This regulation was not in force when Northeastern's application for substitution was filed, January 7, 1938. However, a practice corresponding to the provisions of Rule 6 was then followed by the

Commission in the few cases where it appeared at the time of application for substitution that an interruption of service had occurred. *Gregg Cartage & Storage Co.*, 10 M. C. C. 255, 21 M. C. C. 17. Accord, *Plaza Exp. Co., Inc.—Purchase—Wisconsin Motor Exp. Co.*, 35 M. C. C. 447, 22 M. C. C. 633. Accordingly, in the present case the Commission declined to approve at once the application of Northeastern to be substituted in the place of Gregg.

The effect of the dispositions made by the Commission in the present case is that a fatal interruption in Gregg's service had occurred by January 7, 1938. The elapsed time, chargeable to Gregg, was at least 69 days, since operations had ceased by October 30, 1937. In view of the nature of Gregg's service, as distinct from that of a carrier performing seasonal service only, it would seem clear that the Commission was justified in holding that the length of interruption was such as to extinguish the "grandfather" rights. That administrative determination ought not to be disturbed.

Appellants have pointed to the decision in *H. H. Enders Truck Line, Inc.*, 29 M. C. C. 639, as inconsistent. No bankruptcy occurred there; the interruption chargeable to the carrier commenced only after the sale of rights by the "grandfather" applicant and occupied a very much shorter period

than Gregg's interruption. In the interim of interruption operations were not conducted only because the carriers had been advised by officers of the Interstate Commerce Commission shortly after sale that operation would be illegal without prior approval of the sale by the Commission. Application for approval was then made immediately, and delay beyond this date until the time of official filing was occasioned only by a return of the application to secure further information. *Id.* at 640. As the Commission stated, its postponement of decision on the application for substitution was unusual in such a case; nevertheless, the interruption in service after the date of application would not be counted against the carriers.

For the reasons now stated we think that the Commission's statement quoted above at page 29 and complained of by appellants is not open to objection, and that the Commission's decision on the *Enders* application affords no basis for reversal here.

E. THE EFFECT OF SECTION 212 (A) OF THE MOTOR CARRIER ACT

Commissioners Lee, Porter, and Caskie based their dissent in part upon the ground that the result of the majority decision is to discriminate against carriers whose service has been interrupted before the time when their "grandfather" applications have been acted on by the Commission and

in favor of those who already possess "grandfather" certificates when interruption occurs (R. 68–69, 79, 80); appellants advance this ground as an additional reason why the Commission's order in the present case should be set aside (Br. 19–22).

Section 212 (a) of the Motor Carrier Act, 1935, provides that the Commission may revoke a certificate for failure by the carrier to comply with its terms,[43] but that the revocation shall not become effective unless within a specified period[44] the carrier wilfully fails to comply[45] with an order of the Commission commanding obedience to the terms and conditions of the certificate. Appellants' contention (Br. 19) that the Commission should have given the benefits of this statutory section to Gregg Company is clearly unsound, as the section in terms is applicable only where a certificate has been issued. Redress against any inequality which may arise from the absence of a

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[43] The Commission, pursuant to the authority conferred in section 208 (a) of the statute, has made the requirement of continuous operation an express condition of every certificate by providing that "this certificate shall remain in force for such period as the said carrier shall continue to perform the services herein authorized."

[44] Originally the period was 90 days. By an amendment of June 29, 1938, 52 Stat. 1238–1239, it was reduced to 30 days.

[45] In *Smith Bros.*, 22 M. C. C. 524, 525, the Commission held that cessation of operation due to bankruptcy was a "willful" failure to comply with the requirement, within the meaning of section 212 (a).

similar section protecting uncertified "grandfather" rights must be sought through legislation.

In enacting section 212 (a) Congress sought to safeguard from destruction rights that had been established, by authorizing a period of grace in which the carrier could preserve its licensed status by compliance with an order of the Commission directed to enforce an administrative regulation or one of the conditions contained in the carrier's certificate; the section was not designed specifically to deal with interruptions of service, but to cover infractions of many kinds. It is therefore not available to reflect by analogy the legislative intent in making provisions in the "grandfather" clause concerning interruption of service. Until a certificate has been granted, the inquiry remains confined to the *existence* of operating rights. In determining that question, whether a carrier has any "grandfather" rights, the Commission is not bound in interpreting the statutory language by other provisions which incidentally have come to be applicable in the case of interruption in the service of a carrier already certified to possess transportation authority.

CONCLUSION

The Commission properly denied the application for a certificate of public convenience and necessity in view of the interruption in Gregg Company's service as a common carrier after October 30, 1937. It is therefore respectfully sub-

mitted that the decree of the District Court dismissing appellants' complaint should be affirmed.

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FEBRUARY 1942.

APPENDIX

The relevant provisions of the Motor Carrier Act, 1935, Act of August 9, 1935, c. 498, 49 Stat. 543, 551, 555, as amended by the Act of June 29, 1938, c. 811, 52 Stat. 1236, 1238–1239, are as follows:

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part (U. S. C., title 49, sec. 302 (a)).

* * * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public conveyance and necessity issued by the Commission authorizing such operations: *Provided, however,* That subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and neecssity will be served by such operation. * * * (U. S. C., title 49, sec. 306 (a)).

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or

license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: * * * (U. S. C., title 49, sec. 312 (a)).

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SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1941.

Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Ohio.

[April 13, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

This appeal is from a judgment of a statutory three-judge court denying appellants' petition to set aside an order of the Interstate Commerce Commission refusing the Gregg Cartage & Storage Company a certificate of public convenience and necessity under the so-called grandfather clause of § 206(a) of the Motor Carrier Act, 1935, 49 U. S. C. § 306(a).

The Gregg Company, an Ohio corporation, operated in 1935 and earlier as a common carrier of general freight between points in several northeastern states. In a number of important cities it maintained terminals at which freight was assembled. It performed no over-the-road carrier service with its own vehicles, but provided such service entirely by the use of so-called owner-operator vehicles. Such vehicles as it owned and operated directly were used in cartage in and about Cleveland.

On February 12, 1936, the Gregg Company filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity as a common carrier under the grandfather clause of § 206(a) of the Motor Carrier Act. A hearing was held on June 8 and 9, 1937, before an examiner who, on December 17, 1937, recommended that the certificate be granted.

Meanwhile, the Gregg Company had failed and ceased to operate. It had arranged the filing on October 4, 1937, of a creditor's bill in a state court of Ohio, which on the following day ap-

pointed the company's counsel to be its receiver with authority to continue the business. On the day of this receiver's appointment other creditors filed a petition in bankruptcy in the United States District Court for the Northern District of Ohio, Eastern Division, which on October 27 adjudicated the company a bankrupt, and on October 30 appointed a receiver to preserve the assets of the estate pending the election and qualification of a trustee.[1] In operating the business, the state court receiver confined himself to the completion of shipments en route, and did not solicit or accept new business. On October 14, he filed with the Commission a petition for permission to suspend operations without prejudice to rights under the grandfather clause. The Commission, of the opinion that it lacked power to authorize such a suspension, denied this petition on November 30, 1937. The receiver in bankruptcy took over the business on the day of his appointment, and conducted no operations at any time. Pursuant to an order of the bankruptcy court, on December 6, 1937, he sold the trade names and good will of the bankrupt estate, together with its rights under the grandfather clause application, to appellant, Northeastern Transportation Company, for $850 at public auction.

On January 7, 1938, Northeastern and the receiver in bankruptcy filed a joint application with the Commission asking that Northeastern be substituted as applicant in lieu of Gregg. The Commission withheld action until it had determined Gregg's rights. Northeastern considered a resumption of operations, but decided against it on the advice of field representatives of the Interstate Commerce Commission.

A further hearing before another examiner, confined to the circumstances of the interruption of Gregg's service, resulted in another recommendation of the issuance of a certificate under the grandfather clause. The Commission, however, denied the application December 12, 1939, after a rehearing following the report of Division 5, a majority of which had held similarly on November 14, 1938. 10 M. C. C. 255, 21 M. C. C. 17. The Commission ruled that an interruption of service within the control of the applicant had occurred, that the purchase by Northeastern had conferred no operating rights, and that therefore neither corporation was entitled to a certificate under the grandfather clause. Five commis-

[1] The trustee in bankruptcy, an appellant here, was appointed near the end of December, 1937.

sioners dissented. Gregg and its trustee in bankruptcy then filed a complaint in the United States District Court for the Northern District of Ohio, Eastern Division, praying that the order of the Commission denying Gregg's application be annulled and set aside and that the Commission be directed to issue a certificate of public convenience and necessity to Gregg. A statutory court of three judges was convened, Northeastern was allowed to intervene, and judgment went against the complainants, who appealed to this Court, which noted probable jurisdiction.[2] 42 F. Supp. 266.

Appellants contend that the Commission and the court below erroneously construed § 206(a)[3] of the Motor Carrier Act in holding that, excepting the specified interruptions of service, the statute required continuous operation from June 1, 1935, until the hearing by the Commission on the application. We have, however, held to the contrary. *United States* v. *Maher*, 307 U. S. 148, petition for limited rehearing denied, 307 U. S. 649. *Hoey* v. *United States*, 308 U. S. 510; *Lubetich* v. *United States*, 315 U. S. 57.

Appellants contend alternatively that the Commission should be reversed for refusing to hold that the applicant "had no control" over the cessation of operations.

From October 15, 1935 to December 31, 1936, Gregg was insured against public liability and property damage by an insurance company which in 1936 failed either to dispose or settle certain claims against Gregg and was rumored to be insolvent. For these reasons Gregg cancelled its contract with this company and obtained similar insurance with another company, paying the premiums in advance. The failing insurance company was adjudged a bankrupt in January of 1937, and ceased to pay any claims. Gregg, thereby left with the burden of satisfying claims for personal injury and property damage arising during the period when it had carried insurance in the bankrupt company, paid some of them in the later months of 1937; but approximately 175, estimated to aggregate in their face amount about $200,000, re-

[2] Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. § 47a.

[3] This provides in pertinent part that: "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . except . . . as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation." 49 U.S.C. § 306 (a).

mained unpaid. It also paid about $15,000 on claims for cargo loss and damage, which two other insurers, relying upon "technical" insurers' defenses, refused to pay. All policies of insurance taken out by Gregg had the required approval of the Interstate Commerce Commission.

Solvent on June 30, 1937, Gregg had become insolvent by October 30, 1937. When it appeared impossible to satisfy all demands in full, resort was had to the friendly receivership in the state court. This precipitated the involuntary bankruptcy in the federal court, which in turn brought operations to a halt.

The Commission based its refusal to find that the applicant "had *no* control" over the interruption of service upon the fact that such interruption followed upon an adjudication of bankruptcy resulting from the unsuccessful conduct of its business affairs, and did not go back of the adjudication to find and give detailed consideration to the particular causes of the failure. Appellants contend that this was error, and for a rule requiring that in every case of this sort the Commission must trace out the chain of causation and weigh the bankrupt's judgment against the pressures of circumstance. We sustain the Commission in construing the statute as not requiring it to go back of the bankruptcy adjudication to search for ultimate causes.

How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated through the ages by theologians, philosophers, and scientists. Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct. Certainly that assumption must be made in reference to a corporation such as the applicant. Society, in creating a corporation, vesting its management in a board of directors, granting it large powers and not inconsiderable immunities, can hardly allow that its business affairs are at any time out of the control of those whose duty it is to conduct them. The Bankruptcy Act states that even an involuntary adjudication results only from some "act of bankruptcy," defined upon the clear assumption that it is within the bankrupt's

control.[4] Whether or not this assumption squares with philosophical doctrine, or even with reality,[5] is not for our determination. The Commission, and the courts too, must get on with the application of the federal statutes without waiting to settle the verity of the philosophical assumptions on which they rest.

The Commission was warranted in holding as matter of law that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. The complexity of the chain of causation shown in this case makes it an apt illustration of the impracticability of any other rule.

When it found itself unable to meet its obligations, Gregg arranged a receivership in the state court securing the appointment of its own counsel as receiver. Only the one creditor which filed the bill appears to have been consulted. Thus, the petitioner not only arranged deliberately to commit an act of bankruptcy, but it managed the affair in a manner not unlikely to provoke the unconsulted creditors to file a petition in bankruptcy—presumably considered their best or only means of obtaining the disinterestedness in the administration of the estate to which they were entitled.

The claims which, together with the advance payment of premiums for new insurance, constituted the immediate cause of Gregg's financial difficulties, were, as we have said, of various sorts. Bulking largest were those for personal injuries and property damage, which numbered approximately 175 and in their face amount aggregated approximately $200,000. Their precise nature is not disclosed by the record, and conjecture in this regard is made particularly difficult by Gregg's method of doing business—which was to avail itself entirely of "owner-operator" vehicles for its "over-the-road" services. Doubtless these claims were founded almost entirely upon the negligent operation of vehicles for which Gregg was in some way held legally responsible. We are not informed whether such responsibility rested upon the principle of *respondeat superior*, express contractual assumption, or both. The

[4] The following are defined as acts of bankruptcy: (1) fraudulent conveyances or concealments of property, (2) transfers while insolvent, (3) permitting, while insolvent, a creditor's lien to attach to property through legal proceedings, (4) assignments for the benefit of creditors, (5) permitting or procuring, while insolvent in either the bankruptcy or equity sense, a receiver to be appointed to take charge of the bankrupt's property, (6) admissions in writing of inability to pay debts and of willingness to be adjudged a bankrupt. § 3a of the Act of July 1, 1898, 11 U. S. C. § 21(a).

[5] Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harvard Law Review 189.

rest of the claims, upon which about $15,000 were paid, were for cargo loss and damage. The record does not show whether payment was made solely to retain the good will of shippers, or also to satisfy the applicant's legal liability—which would have rested upon its legal control of the cargo.

It is true that Gregg would not have had to bear the burden of most, if not all, of the claims, had it not been for some unfortunate experiences with insurance companies. Its major misfortune was the failure of the company in which it carried its insurance against liability for personal injury and property damage. What consideration actuated the choice of the particular insurance company and what caution, if any, was observed in selecting it, do not appear. It either misunderstood the coverage of its other policies or purchased policies not specifically comprehensive, and found itself taking care of very substantial claims for cargo loss because of "technical" insurers' defenses which seem to have been sufficient under the Ohio law.

In any event, the choices of insurers, as well of its servants and operators, were Gregg's own—as was the judgment which was exercised with regard to the numerous other phases of its business bearing upon its solvency—and the final product could not have been a matter over which it had *no* control.

Furtherrnore, the interruption of service was the deliberate act of those who for the time being stood in the position of applicant and owned its rights. During the interval between receivership and sale of these rights to Northeastern, we take it that the beneficial interest therein vested in the creditors and the legal title in the receiver or trustee. The federal receiver or trustee could have been authorized to conduct the business of the bankrupt for a limited period, if in the best interests of the estate. § 2 of the Act of July 1, 1898, as amended, 11 U. S. C. § 11. The creditors and their representatives, however, failed to seek such authority, evidently regarding the rights, which later sold for $850, not worth the expense and risk of continuing business. It is the purchaser Northeastern, organized to acquire the "grandfather" rights, and to an undetermined extent identified with the management of the bankrupt,[6] which, having bought these rights in this state of voluntarily

[6] The Commission found that Northeastern was incorporated to take over the bankrupt's rights and business, that the former president of Gregg is the new company's general freight agent, and the former superintendent of

suspended animation, seeks to revive them. But it cannot say that it takes the rights free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title.

The applicant for a certificate under the grandfather clause seeks to exempt his further operations from scrutiny as to public convenience and necessity. If he is able to meet those tests, he may be authorized to operate, even if he never had grandfather rights, or if those he once had have been lost. As the Motor Carrier Act is remedial, and the grandfather clause confers a special privilege, the proviso defining exceptions is to be held to extend only to carriers plainly within its terms. *McDonald* v. *Thompson*, 305 U. S. 263, 266.

In its opinion the Commission stated that "it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale." This we understand to mean that, having determined that the cessation of operations was not a matter over which Gregg "had no control," the Commission was of opinion that by the time of the sale the cessation of operations was of sufficient duration—at least 69 days—to establish that Gregg had not been "in . . . operation since" June 1, 1935, within the meaning of § 206(a). This was a reasonable conclusion, especially since any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet the continuing needs of shippers, and thus to cause overcrowding if the suspended service is resumed.

Finally, appellants claim to be entitled to relief from prejudice said to have resulted from delay of the Commission in acting on Gregg's application made under § 206(a) on February 12, 1936. They point out that had the Commission acted at once a certificate would have issued, thus conferring the benefits of § 212(a).[7] But

transportation is a stockholder of the new company; and that "other connections, if any, between the companies through their respective officials and employees cannot be determined from the records."

[7] This reads in part as follows: "That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission with a lawful order of the Commission, made as provided in section 204(d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder." 49 U. S. C. § 312(a).

Originally the period was 90 days. By an amendment of June 29, 1938, 52 Stat. 1239, it was reduced to the present 30 days.

by its terms § 212(a) is applicable only where a certificate has already issued; and, being a section of general applicability, at least for present purposes, it has no analogical bearing upon the construction of the specific provision relating to interruptions of service made in § 206(a). The delay in passing upon the application was considerable and regrettable, as the Commission acknowledged, but it does not seem to have been arbitrary or the result of any deliberate discrimination, nor, in view of the magnitude of the Commission's task, unreasonable. The Commission had nearly 90,000 applications to pass upon under § 206(a), and of course could not have been expected to pass upon them simultaneously. It is not within our province to remedy inequalities necessarily incident to the administration of the statute.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1941.

Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Ohio.

[April 13, 1942.]

Mr. Justice Douglas, dissenting.

I cannot believe that experts of the subject—say, referees charged with the duties of administering the bankruptcy law—would conclude that every bankruptcy arose without exception from conditions which were within the "control" of the bankrupt in any accepted meaning of the word. Nor do I think that that view would be taken in case of receiverships. Yet that is the irrebuttable presumption which the Commission has created in this type of case. Congress did not create it. Congress merely provided that this class of carrier had a right to the statutory grant on a showing, *inter alia*, that it was in "bona fide operation as a common carrier by motor vehicle on June 1, 1935" and "has so operated since that time" except as to "interruptions of service over which the applicant or its predecessor in interest had no control." Motor Carrier Act of 1935, § 206(a); 49 U. S. C. § 306(a). I would have supposed that the question of "control" was "an issue of fact to be determined by the special circumstances of each case." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145. That would mean that "So long as there is warrant in the record for the judgment of the expert body it must stand." *Id.* pp. 145-146. But that is quite different from giving the word "control" a construction which prevents a person from showing under any circumstances that the events which led to his business disaster were not subject to his "control". On the one hand, the Commission rules that

interruptions of service owing to floods,[1] snow,[2] unsafe[3] or impassable[4] roads, highway construction,[5] droughts which destroy a carrier's chief source of business,[6] ill health,[7] strikes,[8] or the illegal action of governmental authorities[9] constitute grounds for holding that an interruption of service is beyond an applicant's "control". But similar misfortunes of a purely accidental character which affect financial stability and end in bankruptcy or receivership are held as a matter of law to be subject to the carrier's "control".

The distortion which that interpretation involves is well illustrated by this case. There was evidence tending to show the following: During the year 1936 the applicant was insured against public liability and property damage by the Central Mutual Insurance Co. Hearing rumors that Central Mutual was in financial difficulties and was not paying claims, applicant dropped its policy in December 1936 and placed its insurance with another company. On January 11, 1937, Central Mutual was adjudged a bankrupt, and ceased payment of all claims. In the fall of 1937 applicant was forced to pay several substantial damage claims arising from accidents during the period when its insurance policy was in effect with Central Mutual. These payments seriously impaired its working capital. Furthermore, applicant was confronted with approximately 175 additional claims for personal injury and property damage. These were estimated at about $200,000 and arose during the period when applicant was insured by Central Mutual. Applicant settled some of these claims. It was impossible, however, to satisfy the demands of all of these claimants. Receivership followed and on its heels came bankruptcy. There is not the slightest evidence in this record of any negligence, dereliction, or mismanagement on the part of applicant. It is undisputed that its failure was due to the failure of its insurer. And there is no evidence in this record that it did not exercise due care in the

[1] Waltz Transportation, Inc., 10 M. C. C. 30, 33.

[2] Lewis McKay, 4 M. C. C. 93, 94.

[3] Edwards Motor Transit Co., Inc., 2 M. C. C. 73, 74.

[4] Inter-Carolinas Motor Bus Co., 21 M. C. C. 633, 635; Walter Stages, Inc., 24 M. C. C. 451, 454.

[5] Magee Truck Lines, Inc., 28 M. C. C. 386, 389.

[6] Barnes Truck Co., Inc., 24 M. C. C. 465, 467.

[7] H. Bruce Blackburn, 20 M. C. C. 747, 748-749.

[8] Motor Freight Express, 26 M. C. C. 374, 375; Transamerican Freight Lines, Inc., 28 M. C. C. 493, 502.

[9] W. H. Tompkins Co., 29 M. C. C. 359, 362.

selection of that insurer. It would indeed be ironical to cast a presumption against the applicant on that score when the insurance policy presumably was accepted by the Commission, and under its regulations promulgated pursuant to §§ 211(c) and 215 of the Act (49 U. S. C. §§ 311(c) and 315) had to be "approved" by it.[10] Federal Register (1936) Vol. 1, p. 1163, Rule 1. And see 49 Code of Federal Regulations, Pt. 174, § 174.1.

An applicant carries the burden of establishing his right to the statutory grant which is contained in the "grandfather" clause. *Alton Railroad Co.* v. *United States*, 314 U. S. —. But he should not be met at the threshold with a conclusive presumption against him unless Congress has clearly indicated that in the circumstances of his case he has no right even to undertake the burden of proof. If Congress had desired to eliminate all applicants whose continuous service was interrupted by bankruptcy or receivership, I believe it would have said so. As stated by Commissioner Lee in his dissenting opinion (10 M. C. C. p. 263): "If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers, whose applications therefor have not been determined, then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; it could not effect a composition or an arrangement with its creditors and resume operations; if a corporation, it could not be reorganized under the corporate reorganization provisions of the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable." Such a wholesale destruction of operating rights should not be readily or lightly inferred. Operating rights are the very life of any business. Without them this business certainly has no more than scrap value.

Great deference is owed a commission's interpretation of the law which it enforces, especially where the meaning of the statutory language, generally or in specific application, gains body and flavor from the content of the highly specialized field in which the expert body works. See *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Gray* v. *Powell*, 314 U. S. —; *Alton Railroad Co.* v. *United States*, *supra*. But that is quite different from acceding to the suggestion

[10] And see Federal Register, *op. cit.*, Rule IX; 49 Code of Federal Regulations, Pt. 174, § 174.9.

that the non-technical word "control" may be interpreted in a way which goes against all human experience and which does violence to its ordinary and accepted meaning. In this connection it should be noted that if the misfortune which ended in bankruptcy or receivership was not subject to the carrier's "control", then an interruption of service made by the trustee or receiver cannot be attributed to him. Once the court acquires jurisdiction over the estate, the affairs of the business are in its hands, not the debtor's.

Congress has provided that those who attained a position in the competitive transportation system should be allowed to retain the fruits of their struggle. Whether that policy was wise or unwise is not for us to appraise. But we should not permit those statutory grants to be whittled away on the basis of technical and legalistic grounds which find no expression in the statute however much the administrative chore may be alleviated. If the services of a carrier have been interrupted by bankruptcy or receivership, his burden of proving that that default was not subject to his "control" may be onerous. Perhaps in most cases he could not maintain it. But he should be given the opportunity to do so. It is hard for me to imagine a clearer case where he probably could succeed than this one. Yet before we passed on that issue, as the opinion of the Court undertakes to do, we should remand the case to the Commission. For it made no findings on that issue but invoked an irrebuttable presumption which would automatically foreclose in all cases an opportunity to be heard on the real cause of the bankruptcy or receivership.

Mr. Justice BLACK and Mr. Justice BYRNES join in this dissent.